

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION
4 LOCAL 17 INTERNATIONAL ASSOC. OF
5 BRIDGE & IRON WORKERS INS. FUND,
6 Plaintiff,
7 vs.
8 PHILIP MORRIS, INC, ET AL,
9 Defendants.
10 Civil Action No.
11 1:97CV1422
12 Akron Ohio
13 VOLUME 16

14 TRANSCRIPT OF PROCEEDINGS HAD BEFORE
15 THE HONORABLE JAMES S. GWIN,
16 UNITED STATES DISTRICT JUDGE,
17 ON TUESDAY, MARCH 16, 1999, AT 8:00 A.M.

APPEARANCES:

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25 Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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1 occurred after January 1st of '86.

2 With that correction to the instructions, the
3 parties are now afforded an opportunity to make final
4 arguments to you. And I would at this time call upon the
5 plaintiffs to begin.

6

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7 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

8 MR. COUGHLIN: Good morning ladies and
9 gentlemen. It seems like we have been here a long time,
10 together, but it's only been about three weeks. However,
11 in that time, in that three week time period, 20,000
12 people, 20,000 individuals in the United States have died
13 of smoking-related diseases; 120,000 children have taken
14 their first cigarette; 60,000 children in this country in
15 that time period have become regular smokers, and
16 one-third will die a premature death.

17 And it's in part because of the situation we
18 have gotten ourselves in. It started back in 1953 and
19 there was a fork in the road and the defendants made a
20 choice and they went down the wrong road. They went down
21 the road that insured them their profits for the years,
22 insured them their jobs, and their corporations at a time,
23 in their own words, you saw that one document, this the
24 way it ends, with a whimper instead of a bang.

25 They chose the wrong road at that time. And

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1 this is where we find ourselves today as we deal with this
2 problem in this country.

3 And I had said I was going to prove four
4 things. I said I was going to prove that they concealed
5 information, they concealed evidence; I said I was going
6 to prove that they suppressed the development of a safer
7 cigarette; that they denied causation, they still do it
8 today; they denied addiction, they still do it today.

9 The only person who didn't was Dr. Rubin. He
10 came in and he -- does he teach his medical students it is
11 not a cause? He said no, he taught his medical
12 students -- they make a distinction on the stand

13 scientific versus lay people. They say hey, they are not
14 scientist, they don't believe it doesn't cause disease,
15 but even we know the medical students know smoking causes
16 disease.

17 I said I was also going to prove they
18 manipulated nicotine with pH. And I think we have shown
19 that.

20 And finally, I said they targeted children, and
21 you can see they all did that.

22 And the impact of these four components, the
23 impact on the decision making process about smoking and
24 health in this country was from top to bottom from the
25 Surgeon General, where we saw the people from the Surgeon

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1 General's office come in here, Ron Davis, Dr. Harris, Dr.
2 Pierce, the people that actually worked on these reports,
3 came in here and talked about the impact of these types of
4 activities on them. All the way down to our children, who
5 even these guys admit are too immature, not old enough to
6 make an informed decision about the significant risk that
7 occur when you take up smoking.

8 I want to talk a second about responsibility.
9 The defendants always want to say, and with some reason,
10 the smokers should take some responsibility. That's
11 right, they should. We have never said they shouldn't.

12 And they want to say the government should take
13 some responsibility. The government didn't do this or the
14 government didn't do that. That's right.

15 But you know what the defendants never wanted
16 to do? They never want to take responsibility. They
17 never do. Do they come in and say, hey, it's a cause,
18 it's addictive, let's warn people, let's get the message
19 out?

20 No. They embarked on a campaign saying just
21 the opposite. You know what happens? What happens when
22 you get to proving that it is a cause, that it is
23 addictive, that they knew all about nicotine; what do they
24 do? What do they do then? Then they come in and say
25 everybody knew, everybody knew, it was common knowledge.

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1 Let's go back to King James. Hey, let's bring
2 it up into this century, the little white slaves. They
3 said about what Mark Twain was saying. And those other
4 people, everybody knew it caused disease and it was
5 addictive.

6 Well, if everybody knew, how come the heads of
7 the corporations, some of the biggest corporations in this
8 country, went in 1994, raised their hand in front of
9 Congress, and that's Exhibit 3772-A, and said it's not
10 addictive? Why did they say that?

11 Why? Because it was the last leg, it was the
12 end, it was the crumbling of what had gone on for more
13 than 40, 45 years, and it started in 1953.

14 Now, this case charges a corrupt -- a pattern
15 of corrupt activity as well as a conspiracy. And it
16 operated through an enterprise. There is only one way,
17 there is only one way this kind of thing could have worked
18 for all those years, and that was to have a shield, a
19 shield between them and the outside world. And that
20 shield, that protection was the CTR, the Council for
21 Tobacco Research.

22 Remember, it originally started off as the
23 TIRC, and then it became the CTR. And what you had there,

24 there it broke off, part of that broke off when it was the
25 TIRC and became the TI the Tobacco Institute.

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1 The Tobacco Institute became the spokesperson.
2 They were the ones issuing statements all the way out
3 through the years, literally, hundreds of statements
4 throughout the years.

5 And you will have some evidence that some on
6 this board, throughout the years, believed that smoking
7 didn't cause disease, and that the people that say smoking
8 is addictive defies common sense.

9 I guess they are talking about the Surgeon
10 General of the United States. Let's see how they operated
11 this and what happened. This is going to look like a
12 flying saucer, or at least I thought it did when I started
13 out on it.

14 But here is what happened in this case. We had
15 the TIRC, and the CTR at the hub with Hill & Knowlton and
16 TI. And around this hub we had RJRT, Philip Morris,
17 American, B&W, BATCo, and Lorillard.

18 At different times we had somebody else in this
19 picture, and that somebody else that came into this
20 picture at different times was Liggett. And they came in
21 and out of this picture.

22 And what happened is, these companies made
23 these entities, TIRC and CTR, their spokespersons. And by
24 saying that they were conducting a research, the research
25 that they were supposed to conduct because they were

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1 manufactures of this product, by saying they were
2 conducting that research through these entities and having
3 this other entity, TI, issue statements throughout the
4 years denying causation and keeping back the hordes, so to
5 speak, they were able to operate; and operate and sell
6 billions and billions of conventional cigarettes
7 throughout the years; and they monopolized the market here
8 in the United States.

9 And how did they do that? Well, they did it
10 with mailings. And that's what the mail fraud that you
11 are going to be asked to do; they did it with wires, the
12 press release, the televisions, the phones, anything they
13 did in their business, they were using wires all the time.
14 The mailings, hundreds of mailings, hundreds and hundreds
15 of mailings with the ads and magazines that were mailed
16 throughout the country and things like that, throughout
17 the years.

18 Tampering and obstruction of justice. Those
19 are the other two predicate acts. Those are the four
20 predicate acts that we have to prove, we have to prove to
21 carry out this scheme.

22 They did it by four ways; that they used the
23 mails, or they used the wires. We don't have to prove all
24 four, but we have to prove a combination of the four.
25 They obstructed justice. In other words, they kept or

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1 concealed to assist another, to keep going in a crime or
2 they tampered with evidence.

3 And we saw what they did. We saw them keeping
4 stuff when there was an official proceeding, they knew the
5 Surgeon General was going to be coming out with reports
6 every year. And what did they do? They concealed
7 evidence from him or her during the time period, they
8 destroyed documents, they destroyed research, they sent it

9 overseas, they hid it. That's how they carried out this
10 scheme so that nothing would be in their files.
11 And they reached an agreement, it was called a
12 gentlemen's agreement. It's a stunning name, it's their
13 words, not ours. They called it the gentlemen's
14 agreement. And that agreement had two components:
15 The first was that it basically suppressed the
16 development of safer cigarettes, because you would have to
17 have shared that with everybody else. So nobody would put
18 in the R and D, Research and Development, to do that.
19 And the second, they agreed, these companies,
20 these giants in the United States agreed, no in-house
21 biological research in this country. And you heard
22 Dr. Farone come in and testify about that. That he was
23 told about the gentlemen's agreement from Dr. Osdene and
24 others at that company.
25 But more importantly, what you saw is you saw
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1 the documents. Because an agreement this size could not
2 go unmentioned for all these years. It wasn't mentioned
3 at the original meetings in the 1950s, at least we saw no
4 documents from the companies talking about that agreement.
5 It's only later that it surfaced in documents.
6 And let me just talk about these mailings
7 because these are important as you go back to those
8 predicate acts.
9 You heard the Liggett President, Ben LeBow talk
10 about him coming in and using the mails and sending
11 cigarettes through the mails and things like that. And
12 that was at a time when Liggett was a part of this
13 conspiracy. And you heard about the different company's
14 promotional items they sent through the mails. All those
15 things constitute mail use in furtherance of the scheme.
16 And then we have the wires, which we already
17 talked about the use of the phones, the press releases
18 that go over the wires, some of which are on that board.
19 And I talked about the tampering. You have to
20 do it in conjunction with an official proceeding. I think
21 that we proved every year the Surgeon General was going to
22 come up, and these people knew it, they wrote about it and
23 they were concerned about it and they did things in it.
24 You saw that telex come over where they were actually
25 holding back that information as it dealt with heart
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1 disease.
2 And finally, the obstruction of justice; and
3 that's the concealment. And I'm going to read you some of
4 the documents and go through some of the evidence that we
5 believe supports that obstructing of justice charge.
6 Now, how do we know this happened?
7 Well, we saw a lot of documents, I've been
8 talking about it and we had Dr. Jaffe come in.
9 And what did he say? He said, well, that's a
10 pretty big -- he was the first guy, the red-headed guy.
11 He goes, that's a pretty big deal. How can you conspire
12 to control a whole market in the United States? That's a
13 pretty big, tall order. And he talked about it. He said,
14 well, I defined the U.S. market because that's where U.S.
15 customers get their cigarettes from.
16 And that market was so concentrated, we saw
17 that there were only six firms, that there were six main
18 firms in the 1950s, and there are still a limited number
19 of firms. One of them had gone out of business. There

20 were still a limited number of firms that literally
21 controlled a hundred percent of the cigarette market in
22 the United States.

23 First, you need to find the market, and then he
24 wanted to see if it was possible; and he said it was
25 possible. Because the other thing that came in about that
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1 market was that there were significant barriers to entry
2 because they so controlled that market, and to get a new
3 entry for a cigarette, to advertise a brand is such a
4 tremendous task in this country, they were able to do
5 that.

6 And finally, he talked about -- the third thing
7 he talked about was the motivation. Did they have
8 motivation?

9 Well, they sure did. Because in the 1950s, the
10 first scientifically accepted evidence by the medical
11 community in general came out. And that was what they
12 termed internally as the health scare. And they said, and
13 that drove them together in 1953.

14 And let's see what happened in 1953. We looked
15 at some documents from Hill & Knowlton. And we know that
16 in 1953 these gentlemen, the heads of these biggest
17 corporations in the United States, they got together for
18 three meetings. They got together December 10th through
19 11th, December 14, 15 and December 28th. And they got
20 together.

21 And if we could take a look at exhibit, I
22 believe it's 59. This is Exhibit 59, a memo from those
23 early meetings. And if we could take a look and see the
24 document. These are the people that got together to form
25 the committee. And here it talks about the meeting on
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1 December 10th and 11, 1953. And it talks about Cullman,
2 who later went to Philip Morris. Talks about Darr from J.
3 R. Reynolds, Liggett Meyers is there at the first meeting,
4 Lorillard, Brown & Williamson, Tobacco Associates and
5 Philip Morris, and the United States Tobacco Company,
6 mainly known for their chewing tobacco today. And they
7 gathered for all these meetings.

8 And the defendants say, well, these are Hill &
9 Knowlton documents, talking about these meetings as these
10 people get together. And so anything they said bad,
11 anything they say about forming a public relations
12 vehicle, well, you know, you just -- that's just a public
13 relations firm that was talking about them.

14 Well, there are two things wrong with that.
15 One, they are a public relations firms. They should not
16 have been setting up a public relations firm, the TIRC,
17 when in fact they knew the statement said that it was
18 supposed to be an independent scientific research firm.
19 They refer to it as a public relations committee.

20 And number 2, if there was nothing wrong with
21 these meetings, they say, oh, these are Hill & Knowlton
22 documents. If there were nothing wrong with these
23 meetings, where are these other documents? Where are the
24 documents from the defendants? These are the CEOs of
25 these companies going to New York, meeting together three
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1 times in one month in 1953.

2 Where are those documents just jotting down
3 they got to together, talked about this. We are going to
4 solve this problem. You don't see them. You don't see

5 those documents. And why don't you see those documents?
6 You don't see those documents because the
7 agreement that they made in that hotel was an illegal
8 agreement. And it was called the gentlemen's agreement.
9 And that's what the formation of this whole conspiracy
10 started with, is those meetings early on. It changed
11 shapes over the years. People moved in and out a little.
12 The core remained the same.
13 And the idea was that we can't disrupt the
14 status quo. We cannot break the bubble that we have here,
15 because if we do, the chances are we could be out of
16 business. The risks were too great.
17 So this acted like a barrier around these
18 companies as they perpetrated these crimes, kept out the
19 Surgeon General, Congress, FDA, the funds that are here
20 today, the smokers, all of them received the information
21 that the central core group was putting out. So let's
22 take a look at what that information was and why it
23 violated -- why it violates the law.
24 In 1954, January 4th, these companies issued
25 the frank statement. There couldn't be two bigger, I
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1 guess, misnomers than the gentlemen's agreement which was
2 anything but a gentlemen's agreement, and here, the frank
3 statement. This was anything but frank.
4 When they said that paramount in their concerns
5 was people's health, and that they would set up a
6 committee to research all aspects of smoking and health,
7 all aspects, and that that committee would be independent,
8 not just the Scientific Advisory Board, but that the
9 committee that they set up would be independent, and
10 that's what they promised in 1954.
11 And what happened? That didn't happen. If we
12 could take a look at the two promises.
13 We accept an interest in people's health as a
14 basic responsibility paramount to every other
15 consideration of our business.
16 That's what they told the American public.
17 They said we would, we always have and always will
18 cooperate closely with those whose task it is to safeguard
19 the public health. That was the Surgeon General office
20 and people like that.
21 And you heard those people come in. They were
22 the head of that for over four, five years. And they came
23 in here and they got anything but cooperation, and that
24 they were pledging aide and assistance to the research
25 effort into all phases of tobacco use and health.
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1 And the next page.
2 And here is the promise they made, they
3 promised to set up this Tobacco Industry Research
4 Committee, that's the TIRC, okay? And in charge of it
5 they were going to put the Scientific Advisory Board that
6 was going to be completely independent.
7 Now, let's take a look at what we know they
8 actually did. There is no documents from that time period
9 that we were able to find documenting this agreement,
10 documenting that they had entered into this gentlemen's
11 agreement.
12 There is all the stuff from Hill & Knowlton
13 talking about what they intended to do, which was just
14 opposite of this essentially frank statement.
15 Where do we have to go for the documents?

16 Years later after this agreement goes on, and it's in
17 force, we see documents from several of the companies,
18 referring to -- if we could take a look at Exhibit 2519.
19 This is a March, 1983 document, from RJRT from
20 two of the top scientists there, Rodgman and Colby.
21 And if we flip into it, it's talking about
22 Philip Morris, this document, and here, right in the
23 middle of one of their own documents it talks about,
24 "throughout the domestic industry, two gentlemen's
25 agreements were operative in the early days:

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1 "Any company discovering an innovation
2 permitting the fabrication of an essentially safe
3 cigarette would share the discovery with others in the
4 industry."
5 Let's take a look at that. Others termed it
6 differently and phrased it differently. Essentially what
7 this is, when you are talking about giants like this in
8 the industry, is, hey, there is no incentive for you to do
9 the R&D to indict our products, our conventional products,
10 because you are going to have to share it.
11 What groups stayed out of this? Liggett. What
12 did they do? They tried to research smoking and health at
13 first, and they tried to develop a safer cigarette. Okay?
14 They stayed out of it at first, but then they got back
15 into it. That was the essence of this agreement.
16 Now, they say here, the defendants walk into
17 this courtroom and say, at the time we told the Department
18 of Justice that we would do this, that we would share the
19 discovery with others in the industry.
20 Well, that sounds pretty good. It sounds like
21 a pretty good idea. But the actual, what the actual
22 impact is, is far different. And what they didn't tell
23 the Department of Justice is that no domestic company
24 would use intact animals in-house in biomedical research.
25 In other words, when they told the Department

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1 of Justice, hey, we got together, now don't get mad at us,
2 we got together and we are going to share any discoveries
3 we make, okay?
4 That sounded great but they didn't tell them
5 the other half of the deal, that they weren't going to do
6 the research that would be necessary to make this come
7 about. And we not only heard it from RJRT, we saw other
8 documents like Wakeham's 1970 documents from Philip Morris
9 talking about violations of the gentlemen's agreement that
10 were going on at RJRT, and with whom. And we saw them
11 throughout the years.
12 And who else? Did we have somebody come in and
13 testify about it live?
14 We did. Dr. Farone came into this courtroom.
15 You can take a look at his testimony, take a look at the
16 top page. If you take a look at it here, it says here,
17 did you think that was rather unusual that a company,
18 Philip Morris, did animal testing outside the premises and
19 particularly in Europe?
20 And he answered, yes.
21 Initially I asked Dr. Osdene why that was so.
22 And what did he say?
23 And he indicated that the reason for doing the
24 testing in Germany, particularly, was they did not want
25 the results of those tests to be available, if in fact the

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1 company was involved in litigation on safety and health.
2 That's just the opposite of what they promised
3 in the frank statement. And did he give any reason? No,
4 that was the reason.

5 All right. With respect to animal testing and
6 INBIFO, what was your understanding? This is the place
7 over in Europe. Well I just -- one of the things he said
8 was that, I mean, first of all, it's a qualified
9 laboratory, nobody questions that. Nobody questions that.

10 But second of all, that they had made a
11 decision that they would do that.

12 And the other thing that was discussed several
13 times with Dr. Osdene, these are the top people in this
14 company; Seligman, Houserman, Dr. Helmut and Dr. Gash from
15 the Swiss subsidiary, that there was an agreement among
16 the tobacco companies -- they are talking about this in
17 the 70's and 80's -- agreement among the tobacco companies
18 they would not do animal testing of their own products or
19 competitive cigarette products on the premises of each of
20 the tobacco companies; they would only do it in one of two
21 ways. One was, one way was to do it in Europe; and the
22 other way was to do it through the CTR.

23 Well, the impact of those decisions that went
24 to the top of these companies is what we have today, and
25 it was a suppression of the development of the safer
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1 cigarettes; it was a concealment of health information;
2 and it was the concealment of what they knew about the
3 addictive nature of nicotine.

4 That's what the result of this was, and that's
5 the impact that it had on everybody in the United States.

6 Going into this thing, what did these companies
7 know? Let's take a look at the next exhibit, 1953. This
8 is a 1953, February, 1953 RJRT document by Claude Teague.
9 This is before those December meetings. And he gathers
10 together all the research.

11 Let's see what he concludes after gathering
12 together. You heard Dr. Proctor talk. Dr. Proctor said
13 this gathering together of this information was a
14 significant piece of material. And had it been released,
15 had it be released in public, it would have had a
16 significant impact on the knowledge. Because knowledge,
17 and going from one concept to another or one realization
18 to another, is putting together all kinds of ideas.
19 That's what the Surgeon General does every year.

20 And what did doctor -- what did Claude Teague
21 conclude in 1953? These are his words, not ours. The
22 increased incidence of cancer of the lung in man which has
23 occurred during the last half century is probably due to
24 new or increased contact with carcinogenic stimuli. The
25 closely parallel increase in cigarette smoking has led to
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1 the suspicion that tobacco smoking is an important
2 etiologic factor in the incidence of primary cancer of the
3 lung.

4 That's what he, that's after he gathered all
5 that, that was the conclusion that he reached in 1953.
6 Did they share that with the public, no?

7 Let's take a look at Exhibit 114, what Philip
8 Morris knew in the mid-50's. This is a 1956 memo. The
9 top people in this company here, and talking about this
10 problem.

11 Confidential, it says at the top. Let's go to

12 the highlight. Talks about a decrease in carbon monoxide
13 indicates more complete combustion. They knew their
14 problems in their cigarettes. They knew these polynuclear
15 hydrocarbons were real problems. And they knew, down at
16 the bottom, decreased irritation is desirable not only
17 from the subjective viewpoint but also as a partial
18 elimination of a potential cancer hazard.

19 That's what these companies are writing
20 internally.

21 And when the CTR counterpart comes over to this
22 country and visits, here is what they go back with. If we
23 take a look at the 1958 trip report from TRC, the next
24 document, Exhibit 161. This is a trip report where the
25 TRC comes over and they visit all the companies, most of
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1 the companies over here in the United States. And there
2 is actually a list on the first page. And they visit the
3 TIRC over in this country, and here is what they found out
4 when they came over here.

5 Causation of lung cancer. With one exception,
6 H.N.S. Greene, the individual whom we met believed that
7 smoking causes lung cancer if by causation we mean any
8 chain of events which leads finally to lung cancer and
9 which involves smoking as an indispensable link.

10 Actually, what those companies knew in the
11 early 50's, let's see what the company that went on its
12 own, let's see what Liggett and Myers found out.

13 Exhibit 250. Liggett Meyers hired an outside
14 agency, Arthur D. Little, who it was testified was a
15 reputable agency. And here is what this agency concluded
16 for Liggett and Myers: These are basically active
17 materials present in cigarette tobacco, these are cancer
18 causing, cancer promoting, poisonous, stimulating,
19 pleasurable and flavorful.

20 I mean, look at that list; look at the list
21 they have there. The lineup they have there.

22 This is all before the Surgeon General comes
23 out in 1964. And let's see what the Surgeon General
24 decided or said in 1964. This is the 1964 Surgeon
25 General's report where the Surgeon General, for the first
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1 time, concludes smoking causes lung cancer.

2 And let's take a look inside at that report.
3 And if we take a look, it says, associations and
4 causality. There has been a big deal made about just
5 looking at the epidemiology associated here, but this
6 inquiry, even back then, not only looked at that, but also
7 took into account the clinical, pathological and
8 experimental evidence to see if anything discredits the
9 epidemiology back at that time in concluding smoking
10 causes lung cancer.

11 What was the industry's reaction to this
12 report? Did they accept it? Did they work closely with
13 the health community as they said they would in 1954? No,
14 they didn't. Let's see what they were saying publicly.

15 If we go to Exhibit 34, this is a 1953 document
16 where Paul Hahn, the gentleman who called all the
17 companies together, who was in charge of American Tobacco
18 at the time, the top company in the concentration of all
19 the companies, he thought it was time for a statement in
20 November, 1953, just before those companies got together.

21 And let's see what his statement was to the
22 American people: Mr. Hahn's statement was as follows:

23 Believing, as we do that cigarette smoking is
24 not injurious to health, I feel a statement of reassurance
25 to the public should be made.

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1 Now there is a statement of reassurance to the
2 public being made. They come out and acknowledge that
3 they don't know, and yet in the frank statement they said
4 the same thing. They said we don't believe that -- they
5 say exactly this -- that there is no proof that cigarette
6 smoking is one of the causes when they are talking about
7 disease.

8 That's what they were saying. Let's see what
9 they said, what the TIRC said in 1954, Exhibit 85.

10 This is for immediate release, this is one of
11 those releases that goes over the wires. Tuesday October
12 12, 1954. If we could go down to the blow up, yes.

13 Both the smoking and non-smoking public should
14 be reminded that no agent causing human lung cancer has
15 been identified in tobacco, and that no clinical evidence
16 has yet established tobacco as the cause of human cancer.

17 Well, that wasn't true. All the companies were
18 on the board of directors of this TIRC, and they know
19 internally in the companies they are identifying various
20 components as carcinogenic, and they are taking a look at
21 them, and some, around this time period, haven't been
22 disclosed to the public.

23 Let's take a look at Exhibit 749.

24 This is from the Council for Tobacco Research;
25 the name has changed, it's 1969 now, and this is from Dr.

4562

1 Clarence Cook Little. He was the scientific director of
2 that organization.

3 This is, this is the scientific director. And
4 then we have the SAB, the Scientific Advisory Board, which
5 he interacts with.

6 This is 1969, four years after the Surgeon
7 General's report.

8 The scientist who has been associated with more
9 research in tobacco and health than any other person
10 declared today that there is no demonstrated causal
11 relationship between smoking and any disease.

12 The gaps in knowledge are so great that those
13 who dogmatically assert otherwise, whether they state
14 there is or is not is such a causal relationship, are
15 premature in judgment. If anything, the pure biological
16 evidence is pointing away from, not toward, the causal
17 hypothesis.

18 That's what he's saying in 1969 when some of
19 the CTR researchers as Dr. Rubin got up. We see this
20 thing in 1962 pointed to women and an increase in cancer.
21 And this is what the head of the CTR is saying to the
22 public. And did it stop there? Did it? You know, that
23 was some 20 years ago, that statement.

24 Let's take a look at exhibit 3375. Here is a
25 1990 letter from RJR to the principal of a middle school,

4563

1 an elementary school principal. And it says, a fifth
2 grade class -- if we take a look at the bottom blow up.
3 "Despite all the research going on, the simple and
4 unfortunate fact is that scientists do not know the causes
5 of the chronic diseases reported to be associated with
6 smoking."

7 This is a year after the 25th anniversary '89

8 Surgeon General's report. As you heard these witnesses
9 testify, no disease has ever been more well-documented by
10 this time, and yet RJR in this letter asks that that
11 information be passed on to the students.

12 Now how did that happen? How did an
13 organization that had the Surgeon General and the medical
14 community and different people coming out and saying one
15 thing, how did it continue to move forward? How did it
16 keep everybody back?

17 Well, I'll tell you, it kept them back because
18 of this organization and the way it operated. And what
19 you are going to find out, and what you know already from
20 the evidence is that what was -- this organization in
21 here, these three groups were run by the companies, and
22 they were run by the lawyers, the Committee of General
23 Counsel, and it ran right around the CTR.

24 And you'll see other documents where TI was,
25 just in their own words, these are the industry's own
4564

1 words, just a spokesperson for the lawyers.

2 And so what it was, was CTR with Hill &
3 Knowlton going in-between and TI, what they did was they
4 kept the information flowing that the case was not proven,
5 that cigarettes were not addictive. And they drafted,
6 they drafted in expenditures, the amount of money with
7 their ad campaigns and everything else that the public
8 health community -- the impact the public health community
9 was having.

10 They not only did that, they were the ones that
11 knew the most about their own product, and they didn't
12 share that information with the public health community.

13 Let's take a look at their own documents to see
14 what they are saying. There are some interesting things
15 going on here, because you did see that BATCo was doing a
16 lot of research over in Europe consistent with the
17 gentlemen's agreement. There was no quote restriction on
18 BATCo, even though they were related to B&W in doing that
19 research.

20 Let's see. So they did that research. The
21 question is, did it get disclosed the way it should have
22 through Brown & Williamson, or did BATCo participate with
23 Brown & Williamson in this fraud?

24 Let's take a look at Exhibit 161, the cutout
25 from the 1958 trip meeting.

4565

1 This was on the next page of that earlier
2 document that I showed you.

3 In 1950, Liggett and Myers stayed out of TIRC
4 originally because they doubted the sincerity of TIRC
5 motives and believed that the organization was too
6 unwieldy to work efficiently. They remain convinced that
7 their misgivings were justified. In their opinion TIRC
8 has done little, if anything, constructive, the constantly
9 re-iterated not proven statements in the face of mounting
10 contrary evidence has thoroughly discredited TIRC and the
11 SAB of TIRC is supporting almost without exception,
12 projects which are not related directly -- look at this --
13 not related directly to smoking and lung cancer.

14 That's exactly what they said they were doing
15 in 1954 with the frank statement and here internally. And
16 these documents just came to light in the last couple
17 years. Internally they are saying, hey that's not what
18 that organization is doing. They are not investigating

19 smoking habits. They are doing fundamental applied
20 research.

21 Do they do some every once in a while that does
22 indict smoking? Yes, but for the most part, their
23 research, in their own words, was not up to snuff.

24 Let's take a look at how the lawyers that were
25 running this organization describe it.

4566

1 Let's take a look at Exhibit 1911. This is in
2 a November, 17th, 1978 document at a Philip Morris files
3 written by Seligman. And if we flip over, Bill Shinn
4 describes the history, particularly in relationship to
5 CTR. CTR began as an organization called, we know that,
6 the TIRC. It was set up as an industry shield.

7 Well, that's not what they said in the frank
8 statement. CTR has helped our legal counsel by giving
9 advice and technical information, which was needed at
10 court trials. CTR has provided spokesmen for the industry
11 at Congressional hearings. The monies spent on CTR
12 provides a base for introduction of witnesses.

13 Nowhere. That, that was nowhere in any public
14 statement. In fact, throughout the years they constantly
15 reiterated how independent CTR was.

16 There is one person that knew whose name keeps
17 coming up throughout this trial. He was a scientist at
18 work for Lorillard. He was in a position to know what was
19 good research and what wasn't, and he became today the CEO
20 of Lorillard.

21 Let's see how he describes what the CTR was
22 doing in 1974. And this is Alexander Spears. If we take
23 a look at 1328. This is Spears chief scientist at the
24 time, writing to Mr. Judge, the CEO. And here is what he
25 describes the CTR is doing. Historically, funded smoking

4567

1 and health research programs have not been selected
2 against specific scientific goals but rather for various
3 purposes such as public relations, political relations,
4 positions for litigation, et cetera.

5 Wait a second. What are these guys doing
6 making these selections? What is the industry doing
7 making those selections? How did that happen? I thought
8 it was the Scientific Advisory Board.

9 Well, it turns out that that organization was
10 set up in the wrong way. That the Scientific Advisory
11 Board, the things they were given to consider, the grants
12 that they were forwarded, the direction that that
13 organization was sent, impeded that organization from
14 carrying out the directives that they said they would in
15 1954. And that was to investigate smoking and health.

16 Did they fund reputable institutions? You bet.
17 Right here in Ohio, Ohio State, Harvard, Yale, UCLA. How
18 about the scientist that did the CTR projects that the SAB
19 assigned? There is nothing wrong with that. Most of
20 those projects were done very well by reputable scientists
21 and published.

22 We see a diversion of what happened later with
23 the special projects but still the bulk of the work, they
24 keep saying well, that special project you are working
25 with Mr. Doug Lynn, that was only five percent of the

4568

1 work.

2 So we have to look at that 95 percent and just
3 forget that five percent? No, the bulk of this work here,

4 that he's talking about, that Spears is talking about, was
5 not directed at where it should have been. And as a
6 result, CTR allowed this industry basically, what somebody
7 could refer to as a toilet bowl, for lack of a better
8 name, to be able to stand up and say, not proven, not
9 prove, not shown, not done, not addictive.

10 How do you know? Take a look at the CTR and
11 the Scientific Advisory Board. We have independent --
12 independent people taking a look into this stuff. So it
13 allowed them a voice when they otherwise would not have
14 one. It allowed them to have an impact that they wouldn't
15 have had on their own. They could have had it. They
16 could have done the research on their own. They could
17 have come clean, but the CTR, this big old CTR and TI,
18 especially allowed them to have a voice that they wouldn't
19 have had.

20 And how do we know the lawyers controlled it?
21 Not my idea. Let's take a look at their own internal
22 documents. Let's take a look at 1900, Exhibit 1900.

23 Focus in a little closer.

24 This is from the Director of Laboratory,
25 Sheldon Sommers, to the Director of CTR at the time. And
4569

1 he complains that CTR is essentially being run by the
2 lawyers, and he suggests that, I think, CTR should be
3 renamed Counsel for Legally Permitted Tobacco Research or
4 CLIPT for short.

5 You know that would have been the right name.
6 They named this organization that in 1954. Maybe we
7 wouldn't be here today, but they didn't. No, they called
8 it something else. They called it the CTR and said it was
9 completely independent.

10 You see Dr. Rubin when he was shown this
11 document, he knows these guys, he knows who these people
12 were. And when he sees Sommers writing to Gardner in
13 this -- in that manner, that was a little upsetting.

14 And I said to him, now, would that be wrong?
15 And he said, that would be wrong.

16 Let's take a look at Exhibit 448. This is a
17 1964 trip report from the TIRC that came over to the
18 United States. And if we take a look inside, it talks
19 about here, if we could blow up the bottom, it talks about
20 the influence of the lawyers in consequence of the
21 importance of the lawsuits.

22 And that's an interesting thing. They were
23 afraid of the lawsuits, so was it right, because you are
24 afraid of the lawsuits that you go down the wrong road?
25 No, it's not right. But they kept fighting them for 40
4570

1 years, for 45 years.

2 The main power in the smoking and health
3 situation undoubtedly rests with the lawyers and, more
4 particularly, with the Policy Committee of Lawyers.

5 This is the lawyers that we are looking at that
6 controlled that.

7 The members of the -- if you go to the next
8 page, and zoom in on the top part. These are the lawyers
9 that were running those organizations at the time.

10 And we heard about Ramm, how people complained
11 about him later, how he ran everything and decided, well,
12 these people are all associated with the companies,
13 they are not just lawyers of the companies, most of them
14 are Vice Presidents and officers of the companies too.

15 It says this committee is extremely powerful;
16 it determines the high priority of the industry on all
17 smoking and health matters.

18 That's unbelievable. What does this table here
19 have to say? What's this table here have to say what the
20 health industry is to be from this? It would be
21 outrageous. This would be outrageous. Their isn't any
22 training here, these aren't the people who were supposed
23 to be doing that.

24 Let's flip over, see what they say.

25 CTR continues, as before, to confine its

1 research to the diseases with which smoking is not
2 statistically associated. This is the sister organization
3 over in Europe. They know what CTR should be doing but
4 it's not doing it. Let's take a look at why.

5 If we look at Exhibit 4086.

6 This is a 1968 organizational chart. I
7 couldn't have drawn this chart up better. And you know I
8 couldn't because you have seen some of my drawings. I
9 could not have drawn this chart up any better. But I
10 didn't draw it. This is their organizational chart.

11 And if you take a look at it, it's the General
12 Council Committee interfacing with each of the companies
13 on the Board of Directors. And who answers to that?
14 Scientific Director. Off to the side, you have the
15 independent research section, and under that the SAB. And
16 you have over here the special projects, that there was no
17 public acknowledgement of those and how those were done
18 despite what Dr. Rubin said about the little thing on the
19 end, special project that like, that alerted people.
20 There was a whole separate organization going on there.
21 That's how this was run.

22 This organization was wrong from the get go.
23 And it was set up for the wrong purposes and operated the
24 wrong way. That's not to impugn the integrity of a lot of
25 the scientists that did good work there, or the

4572
1 institution that did good work, that was awarded by the
2 SAB over here, for the grants over here, down on this
3 side, down in the corner.

4 But when you have an organization that's run
5 like this, where industry projects the advisory committee,
6 ad hoc committee, special counsel, that was wrong. And
7 that's not what they set out.

8 But it is not just us saying it wasn't
9 independent, it's not just us saying that. Take a look at
10 the next document, which is a 1992 document dated October
11 22nd, 1992.

12 And it talks about what a number of people
13 within the industry says, Damon says after nicotine flap.
14 The independence of CTR is forever tainted. Shin talks
15 about Sommers, who we saw earlier, has affected
16 independence.

17 Let's see what the guy who knows, Alexander
18 Spears, said about CTR. CTR is not independent because of
19 what we have asked them not to do. This influences design
20 of experiments, not truly independent.

21 That's what Spears said about the CTR. That's
22 what Spears said about the hub in the middle of this
23 wheel, the organization that was supposed to be
24 independent. These guys, these companies controlled that
25 organization.

1 If we take a look at the next document, 952,
2 there is a candid assessment. If we blow up this, this is
3 a Philip Morris 1970 document from the chief scientist to
4 the President. It has been stated that CTR is a program
5 to find out the truth about smoking and health. What is
6 the truth to one is false to another.

7 This is exactly the mantra they come into these
8 courtrooms with. It doesn't cause diseases, it's not
9 addictive. When you get too close, when you put on enough
10 evidence, in comes the guy at the end, Martin.

11 Everybody knew. Everybody's known all along.
12 The CTR and the industry have publicly and frequently
13 denied what others find as truth. And they knew it, and
14 that truth is right there in quotes.

15 Let's face it, we are interested in evidence
16 which we believe denies the allegation that cigarette
17 smoking causes diseases.

18 This is 15 years after the formation of that
19 organization, and they have been sending out those press
20 releases saying, hey, we are not trying to, we are not
21 interested in anything, we have got no axe to grind, were
22 their words. We just want to find out the truth and
23 publish it.

24 That's not what these people that were in a
25 position to know -- not me, them -- their words were, in a

1 position to know.

2 Take a look at 1092, its a document from the
3 Tobacco Institute. The other side of that hub. And it's
4 a 1972 document from Freddie Panzer, who worked there, to
5 the chief person in that organization. And it says, for
6 nearly 20 years this industry has employed a single
7 strategy to defend itself on three major fronts,
8 litigation, politics, and public opinion.

9 And let's see what they did, if we take a take
10 a look, and what was that strategy: Creating doubt about
11 the health charge without actually denying it.

12 And how were they able to do that? Through the
13 CTR and the TI, and it helped them on the litigation and
14 political front as well as the public relations front.

15 And it impacted this strategy, these aren't --
16 these aren't our words, these are theirs; for nearly 20
17 years they employed that. That was 1970, they had another
18 25 to go, because these documents didn't come out at that
19 time, they didn't surface publicly.

20 And so what did CTR become? If we take a look
21 at Exhibit 4109, if we take a look at the bottom. CTR is
22 the best, is the best and cheapest insurance the tobacco
23 industry can buy. And without it the industry would have
24 to invent CTR or would be dead.

25 That's what they wrote at a meeting -- at a CTR

1 document, a CTR meeting. That's what CTR really was all
2 about.

3 Now, let's take a look at exhibit -- this is
4 most telling -- Exhibit 1749. Exhibit 1749 is a November
5 29, 1977 document from T. Osdene. Well, you know who he
6 is. T. Osdene is the guy, Tom Osdene was the guy who we
7 saw on the tape over here taking the Fifth Amendment. And
8 so he's the guy who's not talking now. And if you, if you
9 remember the judge's instructions, that you could take
10 that adverse inference but only against a company that he

11 worked for or only against him.

12 Okay. Here is what he has some comments about
13 the CTR program. Remember in the mid-70's, I was talking
14 to Dr. Rubin about a Dr. Kreisher who went to work at CTR.
15 Some people went to work there that were pretty good, and
16 they started programs and started to break out.

17 And Dr. Kreisher's work in the area of AAH,
18 from my point of view, starts out with the proposition
19 that smoking causes lung cancer.

20 How could he not? It was 1977, any scientist
21 should, any scientist would be in that position if you are
22 investigating the cause of disease. What does he say?

23 It is my strong feeling that with progress that
24 has been claimed, we are in the process of digging our own
25 grave.

4576

1 That's the end of that. CTR has changed and
2 moved forward and remains in the control of the lawyers,
3 and we see in 1981, if we take a look at Exhibit 2331, we
4 take a look at that, what happens? The lawyers take more
5 control. And then we have the ad hoc committee, and we
6 talk about Ed Jacoby. These special projects are
7 litigation and hearing oriented. Witness development.
8 Fill in knowledge gaps. Scientific endeavor. That's
9 what's going on with special projects.

10 And let's take a look at the bottom paragraph,
11 because it goes to what they were doing with some of these
12 things. The difference between CTR and Special Four
13 projects. And it talks about the Director of CTR will
14 review the special projects. Okay.

15 And then it talks about, also, if there are
16 work product claims, need the lawyers' protection, e.g.
17 CTR's past Director, Bill Gardiner, didn't think much of
18 Rowe's work; Special Four financed him and he is now
19 published, e.g., motivational research that was done
20 during FTC investigation was done through Special Four --
21 for the lawyers protection -- because of possibility that
22 CTR would be -- if we go to the next page -- CTR would be
23 subpoenaed, e.g., Joe Janus' current study of cohort
24 affect, those born in 1890 to 1910, is a full CTR project.
25 Special Four gave interim support.

4577

1 In other words, they decided what projects to
2 fund based on the possibility of discovery. And if they
3 were a sensitive project you could see through the other
4 documents that were admitted here. If they were a
5 sensitive project, well then, the lawyers funded them
6 themselves. And why was that?

7 Lawyers getting a pretty bum rap in this trial
8 right now, and you know what? They should have gotten it
9 with activities like this that controlled this and to use
10 the privileges that are set up, the privileges that are
11 set up so that you can deal with clients in an open and
12 straightforward manner. And what they did here, is these
13 people that were associated with this company, that were
14 Vice Presidents and officers of this company, that were
15 also lawyers, used these privileges and these work product
16 and lawyers privileges to keep information from being
17 discovered. And that was wrong.

18 That was wrong, and that was not what they.g
19 told the public that they were doing. And let's take a
20 look at who funded the CTR projects. Take a look at the
21 last exhibit.

22 Exhibit 2606 is a document that sets forth the
23 funding and how it's going for CTR, and talks about the
24 plans for a meeting. If we take a look inside it talks
25 about the special projects. Research directed at industry

4578

1 problems; witness development objective; approved by
2 general counsel -- that's the general counsel that we saw
3 running the show -- and funded through the CTR.

4 Well, that information wasn't made public; not
5 that information. And that subverted everything else.
6 And as we got into even more -- in a more deadly deception
7 than the disease and causation, if that's not bad enough,
8 what's even worse, as we move forth in time is now we
9 learn from these documents that we have gotten from the
10 industry, is that they knew how addictive that their
11 product was, that nicotine was. They knew that the
12 cigarette was the best nicotine delivery device there
13 could be, because if you smoke a drug you get it into your
14 system so much quicker.

15 So what did they do? They again moved into
16 another front to subvert the information as to nicotine,
17 and nicotine addiction as to cigarette design, and to
18 nicotine manipulations, and to see what they knew about
19 that. Let's just take a look, first of all, what they
20 were saying about addiction.

21 Take a look at 3213. This is 1988, when the
22 Surgeon General's report comes out. And it talks, these
23 are the guys who are cooperating with our public health
24 officials, officials entrusted with our health.

25 "Claims that cigarettes are addictive

4579

1 contradict common sense."

2 That's the press release they are issuing. And
3 in 1994, you know, they stood up in front of Congress, the
4 CEOs, and made the same statement about 8 years later.

5 Let's see what they knew. You saw Dr. Parran
6 come in here. Dr. Parran came in here from Cleveland, the
7 person that trains literally everybody in northern Ohio
8 about addiction, and nicotine addiction in particular.

9 And I thought that Mr. Adelman made a good
10 point when he was talking to Dr. Cloninger. In one week,
11 in one week Dr. Parran sees more patients than Dr.
12 Cloninger will see in a year. More patients that are
13 addicted just to nicotine and smoking, because that's his
14 practice.

15 And you remember his testimony about how
16 addictive nicotine is. Even much more so than some of
17 these drugs that we associated with deviant behavior, like
18 heroin and cocaine.

19 Talk about the level of addiction, how it's 70
20 percent. It's at such a high level for nicotine, whereas
21 for cocaine and heroin and some of these other drugs it's
22 down lower at 10 percent that are really, just can't get
23 away from those drugs. That's how deadly nicotine can be.
24 And it has such an impact on your health, it's all the
25 more deadly.

4580

1 Let's take a look at what the defendants knew
2 about some of that just quickly.

3 If we take a look at Exhibit 1054. If we take
4 a look inside this exhibit, exhibit -- let's see, this is
5 the -- way down in the 1970's memorandum talks about the
6 majority of the conferees. This is at a nicotine

7 conference they went to. And they published a book, and I
8 think they saw the defendants walking around with a book.
9 You can literally go down to the library and
10 get that book, and it was holding it and like they
11 published everything in that book. I'll tell you what you
12 won't have the first half of this document in that book,
13 you won't have these statements here that talks about no
14 one has ever become a cigarette smoker by smoking
15 cigarettes without nicotine. You won't have the first
16 part of this document in that book, as they waived it when
17 those conferees published those things. This is truly
18 what Dr. Dunn thought about nicotine smoking, if you flip
19 it over to the next page.

20 And you seen -- zoom in -- it talks about the
21 cigarette should be conceived not as a product but as a
22 package; the product is nicotine. The cigarette is only
23 one of the layers. There is a carton which contains the
24 pack, which contains the cigarette, which contains the
25 smoke. The smoke is the final package. The smoker must

4581

1 strip off all these package layers to get to that what he
2 seeks.

3 And what does he seek? He seeks nicotine. And
4 he talks about how great, how great it is. This is their
5 knowledge about it. It's not until 1988 that the Surgeon
6 General comes out that the defendant defended a statement
7 about addiction.

8 Let's take a look, this is from Philip Morris;
9 let's take a look from the same time period from RJRT,
10 Exhibits 1087. Take a look at a Claude Teague memo, who
11 was one of their chief scientists at RJRT, and let's see
12 what he thought about what the tobacco industry was doing,
13 what kind of business.

14 If we take a look at just the top part, "In a
15 sense, the tobacco industry may be thought of as being a
16 specialized, highly ritualized and stylized segment of the
17 pharmaceutical industry. Tobacco products, uniquely,
18 contain and deliver nicotine, a potent drug with a variety
19 of physiological effects.

20 That's what this industry is writings about at
21 the time. And it's not enough they know about it and are
22 writing about it, let's see what RJR does as they, let's
23 say, refine the process of designing the cigarette. And
24 you have seen some of the documents here that talk about,
25 hey, it was no fluke that Marlboro took off and captured

4582

1 the market; that some of the scientists at RJRT thought it
2 was because Marlboro, Philip Morris had thought to design
3 the cigarette better.

4 What did that mean? That meant, to get more
5 nicotine kick, free up nicotine.

6 Let's take a look at what they did as far as
7 design. If you take a look at Exhibit 3496-B, its 1991,
8 talks about "rest program review." Reconstitute the
9 tobacco. And if we take a look at the key issues, it
10 talks about how they can "independently control nicotine
11 delivery, from very low to elevated levels, to address
12 consumers wants and as a research tool."

13 That certainly seems contrary than what
14 they are saying throughout the years about just being a
15 natural product. Here they are, they can independently
16 control the delivery, not to make sure that they have got
17 it back in the nicotine, that they took out, but to

18 address the consumer wants, and as a research tool.
19 And look at down here, number 5, pretty
20 interesting. It reduces biological activity of smoke.
21 They don't admit that it's still a cause of disease, but
22 here they are internally talking about this. And let's
23 see the next company, BATCo. See what they were talking
24 about.

25 THE COURT: You used just an hour.

4583

1 MR. COUGHLIN: Excuse me?

2 THE COURT: You have used an hour.

3 MR. COUGHLIN: Thank you.

4 BATCo was saying many of the same things.

5 Let's move to Exhibit 1868. Let's see what they are
6 saying internally at B&W. This is in 1978. Very few
7 consumers are aware of the effect of nicotine, its
8 addictive nature, and nicotine is a poison.

9 They know this stuff internally, and yet what
10 happens? Are there the disclosures? No, for 20 years.
11 Let's flip to Exhibit 754.

12 Q. This is a Philip Morris Document 1969. "I would be
13 more cautious in using the pharmonic-medical -- do we really
14 want to tout cigarette smoke as a drug? It is, of course,
15 but there are dangerous FDA implications to having such
16 conceptualizations go beyond these walls."

17 What kind of talk is that? What kind of talk
18 is that between the top scientist of these companies?
19 I'll tell you what, it's unlawful. It's unlawful. It's
20 this kind of talk, it's the kind of talk here that we have
21 here, where they are tampering with the evidence.
22 They are obstructing justice and they are issuing those
23 statements, the mail and wire fraud statements, those kind
24 of things that's going on with all these companies here.

25 And as I look at this, as I looked at this

4584

1 graph here, I was thinking that this design -- and I don't
2 mean to say it just because we are here in Akron -- but it
3 seemed like it got to be like a tire that just got rid of
4 everything in its path, got the water off the roads, got
5 rid of hazards, and got rid of everything else.

6 And I saw the other day a tire that they were
7 advertising, that Goodyear was advertising, and it was
8 called run flat. And what it reminded me of is that it
9 ran over some nails and ran over some big corrugated metal
10 and everything else.

11 And it reminded me about Liggett. And it
12 reminded me that Liggett had gone into this tire and it
13 pulled it out; and you heard Ben LeBow come in and let all
14 the air out of this tire. That he came in and he said,
15 hey, you know what, we know, we knew cigarettes were
16 addictive, and we knew they caused disease. And we knew
17 it for years.

18 And you know what? We targeted children. We
19 targeted our product to children. That's when he came in
20 and he said the industry targets children, and he
21 admitted, and you saw for the first time, even without the
22 Surgeon General's warning, that he had his company put on
23 the front of those packs of cigarettes, that nicotine is
24 addictive. That's the company saying that.

25 They are not hiding behind the Surgeon General.

4585

1 We had such a tough time trying to get an answer out of
2 any of these witnesses. You were here. Are you saying

3 that smoking causes cancer? I accept that the Surgeon
4 General -- no, are you saying that they would not give you
5 a straight answer?

6 Well, hopefully, hopefully this isn't like that
7 tire that Goodyear was able to design. Hopefully it's not
8 a tire that you just keep running, and just keep running
9 over people who make revelations like Mr. LeBow or
10 Mr. Farone who came forward in the this trial.

11 If we take a look at Exhibit 1208, and this is
12 a 19 -- this is another Teague document. And we talk --
13 let's take a look at what they are doing and what RJR
14 realized about free nicotine.

15 It talks about smoke pH and free nicotine, in
16 essence a cigarette is a system for delivery of nicotine
17 to the smoker in attractive, useful form. At normal smoke
18 pH, at or below 6, essentially all the smoke nicotine is
19 chemically combined with acidic substances. It talks
20 about how if you move the pH up you get free nicotine, and
21 if you get the free nicotine -- and we saw that chart
22 sitting over there for a long time where the nicotines are
23 outside, they are protonated and unprotonated nicotines.
24 And that those have a bigger impact or a more immediate
25 impact when they hit your brain. And that's what they

4586

1 realized was going on with a couple of these other
2 cigarettes.

3 As they were analyzing them they talked about
4 Marlboro and Winston and Salem and Kool and trying to
5 figure out what it was, how come some of these brands were
6 being so successful and these smokes contain more free
7 nicotine than our comparable brands.

8 It says, as a result of its higher smoke pH,
9 the current Marlboro, despite a two-thirds reduction in
10 smoke tar and nicotine over the years, calculates to have
11 essentially the same amount of free nicotine as an older
12 cigarette.

13 Essentially that's what they knew then. And we
14 know we saw the other documents where Philip Morris, where
15 RJR kept watching Philip Morris and what they were doing.

16 And if we take a look at Exhibit 1935 and
17 documents like that, that essentially RJR caught up to
18 Philip Morris after a 10 year period of time -- it was too
19 late by then -- essentially on the market share, that
20 Philip Morris had captured such a significant part of the
21 market share it kind of kept steam rolling along. But
22 they changed their ways, at least as to the design of the
23 cigarette.

24 And if we take a look at 3318, this document is
25 talking about the use of ammonia. The use of ammonia, we

4587

1 know what it is used for now, "the current usage of
2 ammonia in the tobacco industry - BAT and Competitive.

3 "The U.S. cigarette industry uses about ten
4 million pounds of ammonia compounds a year.

5 "RJR alone has ammonia emissions of 900,000
6 pounds a year.

7 "Five of the six major U.S. cigarette
8 manufacturers use ammonia techniques.

9 "AT has been essential in B&Ws successful
10 development of non-menthol cigarette products at or above
11 par with Philip Morris brands."

12 That's what they are all doing, freeing up the
13 nicotine to get the desired kick that they needed to get.

14 Now, we talked about, we talked about the
15 destruction of documents. And if I could bring up
16 exhibit, the Osdene note.
17 This is Dr. Osdene's note, and you heard Dr.
18 Farone come in and testify. And it talks about shipping
19 all the documents to Cologne to keep in Cologne and
20 essentially that these will be destroyed. That's what
21 this document says.
22 And Dr. Farone came in and said, that's what
23 Dr. Osdene told me, that's consistent with what he told me
24 was going on.
25 And the question: And is that statement

4588

1 consistent with what he told you?
2 Answer: Yes, Dr. Osdene told me he had a safe
3 in his house where he kept both his stamp collections. We
4 were both stamp collectors. And documents that he
5 received from INBIFO, he would read them. They're
6 provided. They provided information to us, and destroy
7 them after he read them.

8 So sending them over to be destroyed and
9 getting them back and destroying them, that's what was
10 going on.

11 If you take a look at a second -- in the
12 meantime, as we take a look for that.

13 (The tape was played for the jury.)

14 Essentially you heard him say that again and
15 again. And I think you have seen enough of it, and you
16 have got the transcript you can take a look at what he
17 took the Fifth to, as to the various questions that he was
18 asked.

19 And did these industry giants did they conceal
20 evidence? If we take a look at Exhibit 364, it's a telex
21 at Brown & Williamson Corporation between Yeaman and
22 McCormick.

23 Over here, it says, "prior to receipt of your
24 telex July 3rd, Hoyt of TIRC --" so now we have the TIRC
25 involved in this. They are in the middle of this exchange

4589

1 between these two company's. "Agreed to withhold
2 disclosure of Battelle report." And you saw what that
3 report was all about; some of those Hippo 1 and 2 projects
4 on nicotine to the TIRC members or the SAB, here they are,
5 here's the guy working at TIRC with the industry
6 connection withholding this information from the
7 Scientific Advisory Board "until further notice from me.
8 Finch agrees submission Bagatelles or Griffith
9 developments to Surgeon General undesirable."

10 Why would they submit it? Maybe they come up
11 with some report it wasn't quite finished, but here,
12 that's not the reason they give. "We agree continuance of
13 Battelle work useful but disturbed at its implications re
14 regarding cardiovascular disorders." That's why they
15 withhold that report.

16 They don't hold it because it wasn't quite
17 finished, this tells you why they withhold the report;
18 they withheld it because it was bad, bad for them.

19 And if you go through and take a look at all
20 the other documents, take a look at Exhibit 218, that
21 identifies carcinogens. It's an RJR memo. And where they
22 identify that they haven't disclosed some other drugs that
23 are carcinogenic that have been identified by others,
24 Exhibit 250-A, Liggett and Myers, a 1961 Arthur D. Little

1 Exhibit 364, we took a look at that. That's it
2 right there. Exhibit 480, Exhibit 583, Exhibit 539, 498,
3 2473, Exhibit 2122. All of these exhibits, and literally
4 they go through these boxes, the boxes you have back with
5 you, you will just see example after example where they
6 kept information back or concealed it or destroyed it,
7 knowing, knowing that these investigation would be going
8 on by the Surgeon General, by the FDA, by Congressional
9 hearings. And they did that so they wouldn't be
10 discovered. And people like Osdene, and in this case
11 people at B&W, are doing that.

12 And what did all that have -- what impact did
13 all that have? Well, the impact that it had, as you heard
14 from Dr. Jaffe, is -- the impact that it had was that the
15 public health community didn't know everything that the
16 tobacco industry knew. And certain cigarettes that were
17 supposed to be safer, that were allegedly safer developed
18 by the companies, they weren't.

19 Saratoga, they weren't marketed as safer. I'm
20 sorry. The companies believed internally they were safer,
21 at least that's what they wrote.

22 Fact, Premier, Eclipse, Next, Project XA, the
23 one from Liggett we heard about, Aerial, all those
24 cigarettes, they weren't marketed as safer products
25 because that would have violated the gentlemen's

1 agreement.

2 And they talk about the FTC rule, somehow the
3 FTC rule that prevents these people from marketing a safer
4 cigarette. Now you know what, there can be no such worry.
5 There is no such governmental agency that says keep that
6 truth from me. We don't want to know. Don't come here
7 and say we do have a product that could be safer and let
8 us -- let us market it in this way.

9 I mean, those rules were put in, you know, in
10 the 50's, because claims were being made that weren't
11 substantiated. They didn't apply to claims that could
12 have been made and could have been substantiated.

13 Now let's go to the last part of where are we
14 now. We are at the children.

15 This whole scheme, this whole scheme depends on
16 getting the children. 81.9 percent of the new market.
17 81.9 percent of when -- let me say that again -- 81.9
18 percent of the children start smoking before the age of
19 18.

20 In other words, everybody starts essentially
21 before the age of 18, where they are old enough to realize
22 and appreciate the risk and dangers of taking it up. And
23 did the tobacco industry know this? Yeah, they did.

24 Then we take a look at Exhibit 1421. This is
25 Myron Johnston, this is a Philip Morris document. And you

1 heard Mr. Morgan come in and say this guy was just a
2 demographics guy, that he was not in the Marketing
3 Department.

4 Well, he wrote these memos to R. B. Seligman.
5 "I pointed out that the 15 to 19 year olds is now
6 increasing more slowly." It is my conclusion that
7 Marlboro's phenomenal growth rate in the past has been
8 attributed in the part to our high market penetration of
9 young smokers and the a rapid growth in that population.

10 And he is talking about 15 to 19 year olds.

11 He writes those memos for 20 years. There is
12 no memo saying, hey, don't write those. And Mr. Morgan
13 tries to put him off as just a guy doing demographics.
14 But you know what? Farone came in here and he went to
15 some of those talks and he said marketing people were
16 there. And he says Myron Johnson had connections up in
17 New York with marketing and that he was one of the
18 favorites, one of the favorite guys being listened to by
19 the marketing group.

20 And if you look at Exhibit 2279. This is Myron
21 Johnson again, later years, we go inside, that document
22 said, "it is important to know as much as possible about
23 teenage smoking patterns and attitudes. Today's teenager
24 is tomorrow's potential regular customer." That's what
25 Philip Morris is doing.

4593

1 They know that it's during the teenage years,
2 as he writes, that initial brand choice is made. And at
3 least part of the success of Marlboro Red during it's most
4 rapid growth period is because it became the brand choice
5 among teenagers. That's what they write there.

6 And if we go to the next document. This is
7 what -- this is what Mr. Farone testified to about Myron
8 Johnston, about what he was doing.

9 "Mr. Johnston was one of the favorite speakers
10 for our monthly Richmond meetings, where the senior
11 management from New York, President of the Philip Morris
12 USA, sometimes the officers of Philip Morris Incorporated
13 would come down to hear what we were doing at the Research
14 and Development center."

15 And if we go up -- come down on that next page.
16 "Did some of those talks, some of those demographics refer
17 to smoking by children, by people under age 18?

18 "Yes, they did.

19 "He had a very good reputation. He had a lot
20 more contacts than the rest of us did with people in
21 marketing in New York."

22 That's who Marvin Johnson was; not some nitwit
23 writing articles in the back rooms of Philip Morris, he's
24 being listened to by the President of this, by the
25 President of this corporation.

4594

1 Let's take a look at Lorillard. Exhibit 1871.
2 Let's take a look at what Lorillard says in 1978 about
3 where they get their market from, that the base of our
4 business is the high school student.

5 Newport in the 70s is turning into the Marlboro
6 of the 60s and 70s. And it is the in brand to smoke if
7 you want to be one of the group.

8 That's outrageous, they know that they are
9 targeting those children, and we saw the other documents
10 where we know they are.

11 Let's take a look at B&W, exhibit 1163.

12 Kool has shown little or no growth in the share
13 of users in the 26 plus age group. Growth is in the 16 to
14 25 years old. At the present rate, a smoker in the 16 to
15 25 year age group will soon be three times as important to
16 Kool as a prospect in any other.

17 That's what they know internally and that's
18 what they geared those ads for, where we saw the young
19 athletic people looking sexy in those ads. I would say
20 that athletes are not very good at telling ages, but

21 that's what we saw in those ads and what they were trying
22 to get people to remember.
23 And did they influence, you heard a lot of talk
24 about it's peer pressure, it's peer pressure, and adults;
25 that influences children to start smoking. And I don't
4595

1 think we ever said anything different.

2 In fact, Dr. Pierce's article was put in, but
3 how it was peer pressure and family influence are some of
4 the major things that people uptake smoking. He also put
5 this, the fact that 34 percent of that group is directly
6 influenced by advertising promotion that causes, that
7 causes them to smoke.

8 Let's see what RJR tried to do, if we take a
9 look at that, the next document in line.

10 If we could go in -- no, next. Sorry. This is
11 still Kool.

12 Let's blow this up in here. This is a
13 document, if we take a look at it closely it says,
14 advertising objective: Overall, Camel advertising will be
15 directed toward using peer acceptance influence to promote
16 the motivation for target influences to select Camel.

17 They are using their advertising to impact that
18 peer pressure. So however Pierce was able to isolate it
19 out, as far as advertising promotion from these other
20 confounding factors, how much is it when you have
21 a company that knows exactly what it's going after.

22 Let's take a look at the pie chart of who that
23 group is that RJRT was going after.

24 Well, here is when people start to smoke.
25 Everybody starts to smoke literally before the age of 18,
4596

1 that's 81.9 percent. That is such a huge figure. They
2 talk about how it is such a little slice of the pie. You
3 know why? What do little kids do? They don't smoke that
4 much. But as they grow and mature they blossom into the
5 market not only in the amount of cigarettes that they
6 smoke -- and you see that in the document -- they grow in
7 size, in percentage. They start smoking one, two
8 cigarettes a day and end up smoking 20 and 40. So you can
9 see the percentage going up there.

10 And now you have a million and now two million
11 kids a year are entering into this group. And yes, while
12 they are one percent of the market at first, they blossom
13 into it and every year, that's how this market is renewed.

14 And you heard Ben LeBow say, hey, if we weren't
15 getting kids we would all be out of business in 25 years,
16 and that's what we should be doing, but that's not what
17 these companies are doing.

18 Let's take a look at the next slide.

19 This is a presentation to the Board of
20 Directors in September, 1974. And it talks about,
21 literally, this is in '74, RJR starting to lose out to
22 Marlboro, as Marlboro passes Winston, as seen by this
23 chart, the children, the 14 to 24 year olds who represent
24 27 percent of the population in '75, they represent
25 tomorrow's cigarette business.

4597

1 As this 14 to 24 age group matures, they will
2 account for a key share of the total cigarette volume for
3 at least the next 25 years. That's what RJR realized at
4 that time period.

5 And if we take a look -- do would he have that?

6 If we take a look at 2176. This document here, 2176, has
7 got to be one of the most damning documents in this case.
8 This is from Jerry Long, G. H. Long to Ed Horrigan talking
9 about teenage smokers 14 to 17 years old, okay. And he
10 talks about the demographics, what's going on with them,
11 and that they are losing share to Marlboro. That is
12 dropping -- that there is dropping versus Marlboro.

13 "More importantly, the report further indicates
14 that RJR continues to gradually decline, and between the
15 spring and fall of 1979 periods of RJRs total share
16 declined from 21.3 to 19.9.

17 "Hopefully, our various planned activities that
18 will be implemented this fall will aid in some way in
19 reducing or correcting these trends."

20 That document offers only reference to the
21 illegal 14 to 17 year old market. This guy was brought in
22 in that time frame to turn this brand around. He's the
23 guy that was overseas, that was overseas with the funny
24 French camel. Is it any wonder after several failed
25 attempts with, you know, the Turk and some other things

4598

1 that failed that we get Joe Camel?

2 Pretty interesting, when Mr. Morgan was on the
3 stand and he said, you know, if you get three out of ten
4 advertising campaigns that work, you are in the hall of
5 fame. You are a 300 hitter.

6 That's right, there are a lot of failed
7 campaigns. So when they slap up some of these foreign
8 campaigns that failed, that's not the point. When they
9 hit on one that works, that gets their target audience and
10 they continue it, and they continue it in the face of
11 criticism, when they know it's attracting kids, that's
12 what's wrong.

13 Let's take a look at what they decided to do to
14 cover up their tracks. Look at 2357. And you can blow
15 this part up. This is a 1981 document from RJR.

16 And it says, "the purpose of this memo is to
17 recommend aging all known under 18 year old smokers into
18 the NFO Panel Data at age 18 and classifying them as
19 continuing smokers."

20 Miss Beasley didn't want to talk about this
21 document. What the document tells you is that they are
22 not going to talk about kids anymore, they are going to
23 age that whole group and they are not going to call them
24 continuing smokers at age 18. So you won't find reference
25 like that in their documents anymore.

4599

1 You do, you do later on still find them, but
2 they try to get rid of all that. And that's what this
3 document was talking about in 1981, a critical time period
4 for RJR.

5 And now if we could take a look at Exhibit
6 2692. Do you have the Burrows tape.

7 (The tape was played for the jury in open
8 court.)

9 MR. COUGHLIN: Let's take a look at Exhibit
10 2692, the presentation that was made. That presentation
11 was all about marketing to kids, and it was in 1984, it
12 was in February of 1984 and it was to Diane Burrows, to
13 the top people in this company. Over here you have
14 Mr. Long, the guy over from International, what he knew
15 about the French camel. Let's take a look at what this
16 document says.

17 "The importance of younger adult smokers.
18 "Younger adult smokers have been the critical
19 factor in the growth and decline of every major brand and
20 company over the last 50 years. They will continue to be
21 just as important to brands/companies in the future for
22 two simple reasons:
23 "The renewal of the market stems almost
24 entirely from 18 year old smokers."
25 Well, not -- you are not born 18, so you got to
4600
1 become 18 and then you have to move in, to quote the legal
2 market, and we already know three years earlier they
3 acknowledged everybody under that age right into 18.
4 "No more than five percent of smokers start
5 after age 24."
6 You see everybody get on this stand and they
7 kept testifying, oh, we are going after this part of the
8 market, they have 85 percent of it; they have got 20
9 percent of it. If that was true, those circles where they
10 have that, that Jerry put up those circles, concentric
11 circles, meet each other in the middle. They would get
12 smaller and smaller if they were just stealing each
13 others' brand shares.
14 They are not stealing each others' brand
15 shares. That's not how this industry continues to grow
16 and, quote, stay alive. What they are doing is attracting
17 the new smokers. Why? Because it says right here:
18 "The brand loyalty of 18 year old smokers far
19 outweigh any tendency to switch with age".
20 Because Diane Burrows is just telling the
21 truth. She's telling the truth within that company and
22 making a presentation. And some people saw it, they liked
23 it.
24 Can you imagine if this document was presented
25 and she couldn't keep track of how many times it was
4601
1 presented, that she went around and presented it to
2 everybody in the country? What did she say, hundreds of
3 people. She made a presentation to these people and
4 marketers like Lynn beastly.
5 Let's take a look at the next major -- and blow
6 this up.
7 It talks about the "younger adult smokers are
8 the only source of replacement smokers. Repeated
9 government studies have shown that:
10 "Less than one-third of smokers, 31 percent,
11 start after age 18.
12 "Only 5 percent of smokers start after age 24.
13 "Thus, today's younger adults smoking behavior
14 will largely determine the trend of industry volume over
15 the next several decades. If younger adults turn away
16 from smoking, the industry must decline, just as a
17 population which does not give birth will eventually
18 dwindle."
19 She couldn't have said it better. She couldn't
20 have said it better than Mr. LeBow.
21 And let's turn to the back of that Appendix B
22 and see who she is talking about.
23 THE COURT: Go ahead, Mr. Coughlin.
24 MR. COUGHLIN: It talks about Younger Adults'
25 Importance as Replacement smokers. And then go down here
4602
1 and go to the categories and show who's smoking when. And

2 most of the people are smoking and starting -- we have
3 seen those documents. Actually they start at the mean age
4 of starting smoking at 14 and a half. And that's what you
5 have here is 14, 15, 16, 17 year old smokers up here.
6 That's when they are taking off smoking.

7 And down here she does the percentages all the
8 way down to 12 year old. That's the report that she gave
9 to this company. And those were the recommendations that
10 were sent out to what they had to do to essentially
11 survive and prosper.

12 And if we go to Exhibit 2849. And if we take a
13 look, this is 1985 document; talks about the Funny French
14 Camel. And, "this is to advise that we have no problem
15 with tobacco company using the design of the Funny French
16 Camel used in the past in France."

17 Miss Beasley didn't even know about the studies
18 done in '58. She didn't know the promotional items; you
19 didn't know the focus groups until the light bulb went on
20 in her head later on.

21 And Mr. Long, over in international, didn't
22 know they had all those problems in France with the Funny
23 French Camel. And here they are being notified that it
24 was done at a time they were attempting to youthen the
25 brand over there in France.

4603

1 And what's the results of that? Well, first of
2 all, here is Exhibit 4247-A which is the book that it
3 appeared over in France a lot, Pilote. And the result is
4 this campaign. And it was, as they say in this book
5 here -- take a look at this Exhibit 3956 -- one of the
6 most successful advertising campaigns ever. A Camel named
7 Joe, and that's what it was.

8 And if you take a look at the CDC reports from
9 that time period, what you have is a 70 percent rise in
10 teen smoking during the ten years of this campaign. And
11 there was an uproar in '91, and did they put pull it? No.
12 Why? Because it was a reversing of their fortunes against
13 one of their competitors. And that's what happened here.
14 We had this industry. We had this industry that knew
15 about disease, they knew about addiction, they manipulated
16 nicotine, and they targeted the children.

17 Safer cigarettes were expressed, at least the
18 marketing of the safer cigarettes. And as official
19 investigations were ongoing, things were suppressed and
20 concealed, and they helped each other out in this
21 conspiracy, and they helped each other out in this
22 corrupt activity, and helped each other out, which is
23 the -- first of all, all that happened.

24 And the impact of that was that it caused the
25 health fund`s that we represent, my clients sitting over

4604

1 here from the health funds, that you will be deciding on
2 later, that they run those, the trustees that take care of
3 and implement those programs as best they can, from the
4 advice of professionals and with the facts that
5 beneficiaries are also impacted by this information.

6 They did the best that they could, but the
7 health funds suffered damage. They suffered damage, and
8 we are here today to ask you to make them, for once, take
9 responsibility; to take responsibility for their actions.
10 And to take it now and to fess up and stop doing the
11 things that should have been done, and to pay for the cost
12 that they have and should have.

13 And now my partner Jonathan Rowe will address
14 you shortly.

15 THE COURT: We'll take about five minutes.
16 This is an appropriate time. I'll just give you five
17 minutes to move around.

18 Same admonitions apply. Don't talk about the
19 case until you begin deliberatins. Take five minutes and
20 don't go anywhere and we'll just give you a stretch break.
21 (Brief recess.)

22 THE COURT: If you will please be seated.
23 Let me just caution, anybody that's in the back
24 of the court standing, leave the room. Anybody that's
25 standing -- wait, wait, wait. Those of you who are
4605

1 standing, get out of the courtroom. Stand up, sir, and
2 remove yourself, you in the blue suit, and get up and get
3 out of the courtroom until there is another break.

4 At this point, this time, the court is going to
5 continue the final arguments. And I'll afford Mr. Rowe
6 and an opportunity to comment.

7 And I'll caution everyone, a courtroom is not
8 something -- wait, wait wait. You can come in, you're my
9 law clerk. But everybody else stays out. Wait.
10 Everybody stays out until the next break.

11 Mr. Rowe, you can begin.

12 MR. ROWE: Thank you, your Honor.

13 Ladies and gentlemen, in the three weeks we
14 have been together, when you may have had other plans, you
15 have learned a lot of things. One of the things you learn
16 is when lawyers make predictions of time they tend to
17 take, they are generally not reliable, but I am going to
18 do my best to get this done within 40 minutes.

19 The subject, what I'm going to address,
20 Mr. Coughlin has cautioned about the misconduct of the
21 defendants that constitute corrupt activity and
22 conspiracy. I'm going to tell you how that caused injury
23 to the funds.

24 The three points I want to start out making
25 about the instructions you received from the court -- and
4606

1 I want to be very clear what I'm saying about the
2 instructions -- is not the law, what his honor told you is
3 the law.

4 I'm doing my best to point out to you three
5 things about those instructions, but in the end you have
6 the instructions and you should rely on what you read them
7 to say, not what I tell you.

8 I believe it is accurate to say these three
9 things.

10 First, the fund is not required to prove direct
11 causation of injury by the defendants. You will hear in
12 those instructions many times the words "directly" or
13 "indirectly."

14 One of the elements of corrupt activity is that
15 if there were damage, directly or indirectly, as a result
16 of defendant's conduct.

17 The same thing is true with elements of
18 conspiracy. This is not a case where the defendants
19 mailed something directly to the health funds. This is
20 not a case where there was some kind of meetings and they
21 lied directly to us. We are not required to show that,
22 nor to prove that they caused injury to us. We are
23 allowed to do that proof indirectly.

24 The second point I want to make, is that we are
25 only required to prove proximate cause. Proximate is a

4607

1 word that means foreseeable. That is to say, that injury
2 to the funds was something the defendants could foresee
3 would happen from their conduct.

4 And the third point, probably the most
5 important point, is that we are only required to show that
6 we were a proximate cause, and not the proximate cause.
7 The instructions told you there may be more than one
8 proximate cause. In this case, obviously, the most
9 appropriate example would be the defendant's misconduct
10 have caused, as we allege, smokers to smoke more.

11 You may also conclude, as fact, one of our
12 witnesses told you from the stand, Dr. Harris, that
13 smokers and their choices, individual smokers, also bear
14 some responsibility, and their choices were another
15 proximate cause of the injury to the funds.

16 The instructions tell you that those two
17 proximate causes, one doesn't cancel the other one out.
18 They go together. As long as each cause is defined to be
19 a substantial factor, then each actor is jointly
20 responsible for the injury to the funds.

21 The defendants are responsible for the injury,
22 so too are the very smokers who are not here. You don't
23 need to worry about that.

24 The one exception you have is if you find that
25 the act of one actor broke the causal connection, the

4608

1 instruction told you the second actor would have to be
2 completely removed from the act of the first, and there
3 would be no connection at all between them, and that the
4 second act could not reasonably have been foreseen.

5 Our position, obviously, is that the tobacco
6 companies sent out the kind of misinformation, the public
7 statements that Mr. Coughlin was showing you for the last
8 hour or so, they reasonably foresaw that those statements
9 were going to affect the choices that individual smokers
10 made, and that in turn injured the funds.

11 In the opening statements both sides, when they
12 came to talk about causation, start connecting things. My
13 colleague, Mr. Withey, was connecting dots, and defense
14 counsel was connecting circles.

15 I rescued from the clip chart a version of the
16 circles that were put up by the defense counsel, and I
17 rewrote it. These are my words, not his, but I think it
18 accurately portrays -- if we could put it up -- the gist
19 of what defendants say we need to prove. We accept this.
20 We accept that this is our burden of proof to prove this
21 chain of causation.

22 Now, I will -- can you all see that all right?
23 I will obviously acknowledge that. I'll be sure to read
24 it. I would obviously acknowledge that this chain was put
25 up in part to try to demonstrate to you that there is

4609

1 a long distance between defendants' misconduct, which is
2 written in the upper left circle, and increased costs to
3 the health fund in the lower right.

4 But the four steps along the way, I think
5 you'll find, are not very difficult steps. As the chain
6 goes down, defendants' misconduct must be a proximate
7 cause of people smoking more, including participants in
8 these health funds. If you find that to be true, the

9 increased smoking of the participants must be a proximate
10 cause; or the next step, the increase in participants'
11 disease. And that second step is what we all think of is
12 the question: Does smoking cause disease, which we heard
13 so much testimony about, as Mr. Coughlin mentioned, so
14 many of the defense witnesses continue to deny.

15 But I think for most of you that will not be a
16 difficult step, the causation chain, based on the evidence
17 you heard.

18 The third step is if there is an increase in
19 diseases, then that results in increase medical expenses.

20 And that was the testimony of Dr. Harris, but
21 so far as I recall -- defense counsel may say otherwise --
22 so far as I recall, was unrebutted. It is a very common
23 sense leap. We all know disease is expensive and it is
24 going to result in medical expense, particularly the
25 diseases associated with smoking.

4610

1 The last step in the causation chain is the
2 increased medical expenses must be a proximate cause of
3 increased costs in the health funds.

4 I don't think there was any evidence offered by
5 the defendants to rebut the testimony of Professor
6 Ghilarducci.

7 The health funds sits at the bottom of this
8 chain, and they have no choice but to pay the smoking
9 related costs of their beneficiaries. The health funds
10 are there for smokers and non-smokers, that's why we have
11 emphasized to you over and over this is not a case of
12 smokers against the tobacco companies. The health funds
13 have to serve the non-smokers who make up a greater
14 portion of their membership than the smokers, and they
15 have to do it with the money that's available from
16 contributions. And those contributions are greatly
17 reduced when increased medical expenses from smoking are
18 laid at the fund's door.

19 Now, before we look at the first step of this
20 cart, I want to briefly talk about that issue of proximate
21 cause.

22 If we can go to the next document. This is
23 Exhibit 1913, which is a Philip Morris memo from 1978 in
24 which a Philip Morris's employee says, more industry
25 antagonists are using an economic argument against

4611

1 cigarettes; i.e., cigarettes cause disease, disease
2 requires treatment, major health costs are borne by the
3 government, and the taxpayers pay in the end.

4 That's the same four steps we saw on the
5 causation chart, with one exception; we have got the
6 government instead of the health funds in this Philip
7 Morris memo.

8 But if we can go to the next document, which is
9 Exhibit 1831, you can see that the defendants anticipate
10 that the health funds, they reasonably foresaw that the
11 health funds were in the same position as the government,
12 picking up their costs.

13 "I also was particularly interested in the
14 reference of the double stake that unions have in reducing
15 health costs."

16 The double stake is not only the individual
17 union member injured personally by smoking, but the union
18 and management health fund is also injured. That's what
19 the double stake is. They knew that's who was being

20 injured. They knew that causation chain was out there.
21 The only thing that was keeping it from being brought in
22 the courtroom was the fact that their documents, their
23 misconduct, their corruption was not something that was
24 publicly known until very recently.

25 Now, looking at the first chain in that, the
4612

1 first step in that chain, their misconduct caused
2 increased smoking. This is where we called several
3 witnesses to talk about how restricting information that's
4 available to smokers results in greater smoking.

5 Who the defendants called in response was a
6 history Professor James Martin, who said we didn't
7 restrict the flow of information, it's all been common
8 knowledge.

9 We can go to the next slide.

10 We called Professor Proctor -- I think you
11 remember him, he's a history professor -- to testify that
12 the judgment of history is that tobacco misconduct has
13 been one of the longest running campaigns of deception in
14 the history of science. He testified that it's had a very
15 substantial impact increasing the consumption of
16 cigarettes.

17 His point was, doubt is our product, that's the
18 tobacco industry byline. They know that they -- that the
19 way that they increase consumption is by -- and this is
20 their words not ours -- "doubt is our product."

21 As Mr. Coughlin explained, they keep on putting
22 out those public statements to keep getting people to
23 doubt that there really is proof that smoking causes
24 disease, and therefore the consumption of cigarettes
25 remains higher.

4613

1 If we go to the next slide.

2 This is the -- we better go to the next one.
3 Let's stay there. I'm sorry.

4 This is -- I put this out here just as one
5 example of what the public statements were. What they say
6 in 1970, that six years after the Surgeon General's
7 report, there are eminent scientists who question whether
8 any causal relationship has been proved between cigarette
9 smoking and human disease.

10 They keep saying that over and over. And
11 people reach out and grab that belief. That's what Dr.
12 Davis told you, that's what Dr. Harris told you.

13 If we can go to the next line.

14 This is the consumption curve from the Surgeon
15 General's report that was shown to you many times. And
16 what it tells you is that smoking consumption is not a
17 natural -- there is no natural level, it goes up and down
18 depending on the information that is available. It goes
19 up and down depending upon social forces.

20 You can see in the early half of the century
21 smoking rose very dramatically. When the health scare
22 came in the 1950s, it dropped precipitously. When these
23 people got to go at the gentlemen's agreement. And in the
24 health statement you saw from Mr. Coughlin, they jumped
25 back again and turned it around. It rose again until

4614

1 1964, at the time of the first Surgeon General's report,
2 and then it turned down again. And it's gone up and down
3 since then, depending on various statements of what
4 information was available to consumers, as Professor

5 Proctor and Dr. Harris testified.
6 If we can go to the next slide.
7 Professor Proctor points out, by looking at
8 that curve, simply, if you can move that curve backwards
9 10 years, you would have reduced a tremendous amount of
10 smoking in this country. And that's what would have
11 happened if the Surgeon General's report would have come
12 out in 1954 instead of 1964.
13 Think of what the world could have been in 1954
14 if the defendants had simply told the truth, as they said
15 they were going to in the frank statement. Think if, in
16 conjunction with publishing the frank statement, they had
17 published Dr. Teague's 1953 memo, Exhibit 18, that was
18 shown to you earlier. The one where he concluded that
19 smoking causes cancer.
20 And he lays out the case in a way that
21 Professor Proctor said, as an expert, told you. It was
22 very difficult for Professor Proctor to reconstruct 40
23 years later that it is a substantial impact. That's what
24 we are required to show, a substantial factor in the
25 increase in cigarette consumption was caused by the
4615
1 defendant's misconduct.
2 If we can go to the next slide.
3 Professor Harris testified -- I neglected to
4 mention one thing about that slide, too. Some point was
5 made by either Professor Harris or Professor Proctor, that
6 this smoking that went on in the 1950s, that was smoking,
7 primarily that uptake of smoking that happened in the
8 1950s and 1960s, that could have be avoided if the tobacco
9 industry the told the truth.
10 That's the injury that the funds are treating
11 today. Those are people who started smoking when they
12 were 12 to 17 in the 50s and 60s. Those are the people
13 that right now, that these funds are treating for smoking
14 related diseases.
15 If I could go to the picture of Dr. Harris.
16 Dr. Harris told you the same message.
17 Information matters. He looked at it from a number of --
18 from the perspective of a number of disciplines. And he
19 told you over and over again, information matters.
20 He said, imagine if the information that the
21 tobacco companies had in their files had been available to
22 the public?
23 We can go to the next slide. This is exhibit
24 287, in which BATCo indicated as a result of this, this is
25 from 1962, the Surgeon General's report: As a result of
4616
1 these various researches we now possess a knowledge the
2 effects of nicotine are far more extensive than exists in
3 public scientific literature. Having the effect on the
4 consumption of cigarettes if that information had been
5 public.
6 If we can go to the next slide.
7 Remember Dr. Davis came in and testified, Dr.
8 Davis was the Surgeon General of Michigan for a while. He
9 was the Director of the Office of Smoking and Health, the
10 youngest director they ever had. He was the witness who
11 was responsible for putting together most of the Surgeon
12 General reports you looked at.
13 I think you can see he was a person who cares
14 very passionately about public health, and he told you, we
15 do put the message out: Yes, we try to tell individual

16 smokers that it is dangerous. Yes, we try to tell them it
17 will cause diseases. Yes, we try to tell them it's
18 addictive. And he told you the message doesn't get
19 through.

20 Remember why he said the message doesn't get
21 through? Because of all the static that is put out by the
22 defendants. They keep putting out those misleading public
23 statements.

24 And he also focused you on the ads. He said,
25 look at the ads that reassure smokers, that entice

4617

1 smokers, that give people a reason to keep smoking, to
2 think maybe those eminent scientist we have been hearing
3 about are right and the case hasn't been proven. Maybe I
4 can get success in sports and sexual fulfillment from
5 cigarettes.

6 And these are the kinds of ads he showed you.
7 I know you remember this one. This was a guy that I keep
8 telling my wife I look like, and she says: There is no
9 way, John.

10 And I think you remember the next one, too.
11 This is the one my wife tells me she looks like.

12 But these ads are out there and they are out
13 there for a reason, and they are part of the static that's
14 going on.

15 Let's have the next ad, please.

16 This is the one they call the farmers daughter
17 ad. I think when you get back to the jury room, I urge
18 you to look closely at it. There is a girl on the bed in
19 the window there, and I don't know how the tobacco
20 companies can claim this is an ad about a 25 year old,
21 because I do not know any 25 year old daughters who still
22 live with their father's who chase away young men who may
23 come to see them. This ad mocks the Surgeon General
24 warning with the viewer discretion advised. It sends a
25 message to the public, don't worry about the Surgeon

4618

1 General smoking is fun, smoking has sexual potential for
2 you. That's what goes out.

3 Now the defendants say, it's common knowledge.,
4 They say it's common knowledge that smoking is causing
5 disease. It's common knowledge that it's addictive, ever
6 since Mark Twain and King James.

7 If it is common knowledge, why do they work so
8 hard to hide it in their own files? If it's common
9 knowledge, why did these seven guys, the chief executive
10 officers of the seven tobacco companies stand up in front
11 of Congress in 1994 and say, I don't have this common
12 knowledge, that later on we are going to bring in
13 Professor Martin to tell you about, I don't think
14 cigarette smoking is addictive.

15 At the bottom, it's just a very, very cynical
16 thing that the tobacco companies try to pull over on the
17 public. They come into court. They deny causation. They
18 deny addiction. And then they want to take advantage of
19 it and say but everybody knows.

20 Everybody doesn't know. There is a difference
21 between what you know today and what you knew three weeks
22 ago when you came in this courtroom.

23 Remember, I got professor Martin, probably the
24 only question of mine he answered when I ask him: Doesn't
25 what knowledge that is common change over time? And he

4619

1 says yes, it does. And he had to say that because we only
2 learned very recently they manipulate nicotine. We only
3 learned very recently their internal documents showed they
4 always knew smoking causes cancer. That smoke was
5 addictive way back in the 60s. We only learned this very
6 recently.

7 Our knowledge has changed. They want you to
8 sit in your chair and say: Boy, I remember when the
9 Surgeon General warnings came out in the early 60s, so I
10 guess everybody really has known about this.

11 But we didn't know and I tried to bring that
12 point home by playing that Flintstones ad during Professor
13 Martin's examination, just to remind you in the atmosphere
14 of the 1960's you can still have a television show like
15 that, a cartoon, and you can have people smoking. And you
16 know that couldn't happen today. You know that would not
17 be tolerated. And that's because the world has changed
18 and was known, has changed. And the reason it wouldn't be
19 tolerated is because what's come out of the defendants'
20 filings.

21 We now know why that's wrong. We now know
22 about the targeting of children that we didn't know in the
23 60's. So for them to say it's been common knowledge,
24 blame the smokers is not fair, and it is not historically
25 accurate. And that's what Dr. Davis was telling you by
4620

1 showing you these ads.

2 Do they have a First Amendment right to run
3 those ads? Absolutely. Do they have a right to put
4 attractive models in their ads that my wife and I wished
5 we looked like? Absolutely.

6 But it is wrong to run those ads and suggest to
7 people that we are not pitching to you success and sports
8 and sex, when in fact that's what they are doing. And
9 it's also wrong to come into court and say, we are not
10 affected, because of common knowledge.

11 Professor Martin didn't even want to look at
12 the ads. He didn't want to look at the public statements
13 with you. They are out there, drowning out the common
14 knowledge.

15 Do smokers have some awareness that smoking is
16 bad for them? Yes. But they get all these other signals,
17 all this other static that causes them not to know, and
18 our common knowledge, at least in the 60s and 70s and 80s,
19 was very murky and very confused.

20 You know, I think I told you during one of the
21 summations, a game I used to play with my children. My
22 kids are here in court and they are a little older than
23 when we played this game. But when they were younger,
24 they had a keen interest of the change in my pocket. And
25 I would pull a quarter out and say: Okay, we'll flip for
4621

1 it. And I would flip it up and I would say heads I win
2 and tails you lose.

3 And you know what, they never got one of my
4 quarters. They got old enough finally to figure out the
5 game, but I was just like the tobacco industry. I was
6 playing a game they couldn't win. They come in here, deny
7 addiction, deny cause, give the smokers the reason to
8 smoke, and then they have the gall to come in here and
9 tell you it is common knowledge, you can't blame us,
10 everybody knew any way.

11 Maybe we did lie; maybe we did mislead. It

12 doesn't matter, you all found out. We didn't find out.
13 And it wasn't fair to smokers, it wasn't fair to the
14 funds.

15 Let's look at the next slide. This is hard to
16 read. I'll skip this one.

17 This is the transcript of the Chief executive
18 Officer of Brown & Williamson, Mr. Brookes, who came in,
19 and I think you recall how difficult it was for pages and
20 pages, to try to get him to answer the question. He was
21 the master of the game, he's still not going to tell you
22 whether smoking causes disease or not.

23 Could we go to the excerpt from the Garfield
24 testimony?

25 James Garfield is a trustee of one of the
4622

1 health funds. His testimony was put in by deposition and
2 was not read to you, but here is what he said.

3 He said, he was asked: You were aware at the
4 time you were a trustee in the 1970's that cigarette
5 packages had warning labels on them? I'm not sure it
6 started in the 60s but I know it started, I'm not sure
7 when it started.

8 And did you believe those warnings?
9 No.

10 You were aware, generally speaking, of the
11 Surgeon General issuing reports on smoking and health?
12 Yes.

13 And when you heard about these reports did you
14 believe them?
15 No.

16 Would you agree with me that it was commonly
17 known that cigarettes were claimed to cause cancer in the
18 1970s and 1980s?
19 Oh, I wouldn't agree with you on that. You
20 keep using the word "cancer" and I can't buy it.

21 Now that is just one guy, and I can't tell you
22 that's proof about what is or wasn't common knowledge, but
23 he is sort of the man-on-the-street. And the defendants
24 say to you, come on, who would you believe on a question
25 of smoking and health, the Surgeon General of the United
4623

1 States or the tobacco industry? And they make it sound
2 like, of course, everybody would know the Surgeon
3 General's got to be right.

4 That's not the way it happened for Mr. Garfield
5 and that's not the way it happened for the man on the
6 street, generally. And the defendants knew that. This is
7 their internal document from the early 60s, Exhibit 290.

8 From time to time, the man on the street
9 interviews ask about the smoking question. In almost
10 every one of these, there will be a quotation that is
11 almost an exact paraphrase of some statement issued for
12 the tobacco accounts.

13 That's from the CTR and TI. They know their
14 propaganda works, and the reason it works because if you
15 think about it, how do we get information in our society?
16 Sometimes you get it directly, where it is nice and
17 labeled, and it says this is from the Surgeon General and
18 this is from the tobacco companies. But a lot of
19 information you get second, third, fourth hand, and what
20 they call common knowledge is something that doesn't get
21 told to you, who the source is.

22 And so you hear eminent scientists doubt

23 whether the smoking causation link has been proved. And
24 you hear those words rattling in your brain, and you think
25 there might be some truth to it. And the fact that it

4624

1 came from the tobacco industry's propaganda machine is not
2 something you know, and that's why the man in the street
3 like Mr. Garfield gets confused.

4 And as the next slide demonstrates, when Dr.
5 Davis was making his point about how hard it is for the
6 public health message to get out, the red lines
7 representing how much money is being spent on advertising
8 and promotion to drown out the little green box of public
9 health messages should leave you no doubt about why there
10 is confusion and why it is not accurate to say that there
11 was common knowledge that smoking causes disease.

12 Now, the next step in the link is that
13 defendants' misconduct. We showed defendants' misconduct
14 caused participants to smoke more by confusing them, by
15 allowing them to believe that there was a reason to keep
16 smoking, by drowning out the public health messages that
17 might have been available to individual smokers.

18 The next step in the link that we have to prove
19 is that the increased smoking was a proximate cause of an
20 increase in participants' disease.

21 Now, I wouldn't have thought in 1999 this would
22 be an issue that would really be contested in an American
23 courtroom. We called Dr. Davis and he laid the case out
24 for you. And if you are like me, I don't think I ever
25 heard about this, how compelling that case was in 1964.

4625

1 I'm just going to show three quick charts. I
2 showed you this one, you remember? This is 114-B, that
3 the more cigarettes you smoke per day, the more your
4 cancer chance goes up.

5 Next. The more you inhale, the more your
6 chance of cancer goes up.

7 And the younger you start smoking, the more
8 your chance of cancer goes up.

9 As he told you, there is no answer to those
10 charts and there never has been. The defendants called
11 Dr. Carchman, and he talked for a long time and I never
12 heard him address this point and there is no answer to why
13 the dose response relationship, as Dr. Davis calls it, has
14 this effect.

15 There is only one explanation. You remember
16 Dr. Davis explained to you. It cannot be accounted for by
17 air pollution or any other 20th Century industrial causes.
18 There are no confounding factors that could explain why
19 the younger you smoke, the more you get cancer; the more
20 you inhale, the more you get cancer; the more cigarettes
21 you smoke the, more you get cancer.

22 You don't even have to believe Dr. Davis about
23 this point. You can believe the defendants' witnesses.
24 The one guy who had the integrity to come in here and say
25 yes, smoking causes disease. Dr. Rubin came in here and

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1 he said that's right. Of course, he kind of had to say
2 that because his textbooks says it. It says smoking
3 tobacco is the single, largest preventable cause of death
4 in the United States. The direct health costs to the
5 economy of tens of billions of dollars a year, over
6 400,000 deaths a year occur prematurely because of
7 smoking.

8 That's their witness, not ours.
9 And you remember that defendants called
10 Mr. Wecker, and I'm not sure I figured out what Mr. Wecker
11 had to do with causation, but he didn't think it was
12 400,000 deaths a year.

13 Well, Rubin does, so they disagree on that, I
14 guess.

15 But did it really matter? Does it matter if
16 it's 400,000 deaths a year? Or 200,000 deaths a year?
17 300,000 deaths a year? I found that testimony
18 incomprehensible on the point of causation. I don't know
19 what it had to do with any of these links in the chain but
20 it's really irrelevant to talk about whether the deaths
21 are 400,000 or merely 300,000. The whole thing of denying
22 causation is a legal game. This is what the 1976 document
23 you saw before says.

24 1586. The public position of tobacco companies
25 with respect to causal explanations of the association of
4627

1 cigarette smoking and diseases is dominated by legal
2 considerations.

3 The industry has retreated behind impossible
4 demands for scientific proof, whereas such proof has never
5 been required as a basis for action in the legal or
6 political field.

7 Ladies and gentlemen, today we are in the legal
8 field. All that mumbo jumbo you hear from the stand, from
9 the witnesses they paraded in here that deny smoking
10 causes disease. Is not applicable here in the legal
11 field, that's been proven well beyond clear and convincing
12 evidence.

13 If we can go to the next line.

14 The third step in the chain, I forgot to
15 mention was the one that I talk about briefly that
16 increased disease causes increased expense.

17 We all know that as a matter of common sense,
18 and Dr. Harris was unrebutted, the latter stage is the one
19 Professor Ghilarducci expressed, the increase in medical
20 expenses caused increased costs to the health fund.

21 Now she was unrebutted. We heard no witness to
22 come in and say that she was wrong with she said, the
23 health funds have no choice but to cover their members.

24 The health funds can't do differential rates
25 like a private insurance company can. They don't charge
4628

1 rates, and they don't have a way to control the behavior
2 of smokers who are changing from employer to employer
3 anyway.

4 She said, and her uncontested opinion was, the
5 funds have not been derelict with respect to adoption of
6 smoking cessation programs. And she explained to you the
7 delay in the availability of smoking cessation programs in
8 this country can be laid at the doorstep of the tobacco
9 companies. They held off for 25 or 30 years the
10 recognition that smoking is an addiction. And by holding
11 off, Professor Ghilarducci told you that delayed
12 identifying cigarette smoking as a disease until it was
13 identified as a disease, there was no treatment, there was
14 no protocol for any kind of smoking cessation program.
15 And she told you the protocols haven't been on line until
16 the last year or two.

17 So here come the funds now, they finally have a
18 chance. There are some smoking cessation programs that

19 are just becoming available and Professor Ghilarducci told
20 you the funds are still constrained by two important
21 things. They have a fiduciary duty to their members,
22 which requires that they be very, very conservative with
23 the use of money. They are always the last ones with
24 wellness programs and prevention programs for a reason.
25 They have to see a track record before they go and spend
4629

1 this money which would otherwise go to pay families of

2 working people's health benefits, before they spend it,
3 they have to know the program works.

4 And the other reason that they are cautious
5 about using the money, they are very strapped for cash.
6 She told you these funds just don't have a lot of money.

7 Now you saw evidence in the cross examination
8 of Professor Ghilarducci about one fund that has a 94
9 million dollar research. And I'm sure you are going to
10 hear about that from the defendants on closing.

11 That, ladies and gentlemen, is a pure red
12 herring. Listen carefully. They talk so much about
13 context, listen carefully if they give the context for
14 that number. If they tell you how many months that
15 represents for the reserves. If they tell you how much
16 that fund's reserves were just two years earlier. If they
17 tell you whether that number represents an unusual
18 situation in investments for one year. If they tell you
19 whether that fund anticipates in the same document, where
20 they find the 94 million, a 15 million dollar loss the
21 next year.

22 Listen carefully and see if the defendants give
23 you the context for that, or if they just try to suggest
24 to you this fund is delinquent for not adopting smoking
25 cessation. I think you will conclude the fund was not
4630

1 delinquent.

2 Professor Ghilarducci told you, and her opinion
3 was un rebutted, she told you these funds face one serious
4 problem -- and there was no testimony from the defendants
5 on this point -- that retirees are going to be coming on
6 line for these programs, and it's a huge expense, and the
7 actuaries have to know what to do, if this money could be
8 spent for smoking cessation and if they can do it, they
9 will do it. Because they have one purpose and one purpose
10 only, and that is to improve the health of their members
11 and pay health benefits of its members.

12 The last point I want to make, in order to keep
13 my time commitment, is the point about reliance.

14 You heard about reliance in some of the trustee
15 depositions that were read to you. The question was
16 asked: Did you, sir, rely upon anything that the tobacco
17 companies said? Did you rely upon any information from
18 the tobacco companies?

19 Professor Ghilarducci explained why that is the
20 wrong question. And she showed you this chart that the
21 trustees might not be aware that their fund indirectly
22 relies upon information from the tobacco companies? The
23 trustees simply don't know it, because they are not part
24 of that information chain.

25 So it's not a fair question, she said.
4631

1 Now, an effort was made during the defense case
2 to attack the concept that this chart illustrates that the
3 tobacco companies were supplying the information to the

4 medical community. The suggestion is that the medical
5 community doesn't list the tobacco companies, and it's
6 that argument again about if you are a doctor, who do you
7 listen to, the Surgeon General or the tobacco companies?

8 But remember, ladies and gentlemen, the
9 evidence that Mr. Coughlin was showing you, who are the
10 tobacco companies? They are this enterprises, CTR and the
11 Tobacco Institute. CTR talks very directly to the medical
12 community.

13 A distinguished doctor, Dr. Rubin came in for
14 the defendants and said CTR was wonderful, they have four
15 Nobel Prize winners. They do great work. The medical
16 community does listen to CTR and CTR was part of sending
17 out the false message about smoking and health that
18 delayed the recognition by the medical community. It
19 delayed the 1964 Surgeon General's report. It delayed the
20 labeling that smoking is an addiction.

21 CTR and the tobacco companies have been right
22 in there causing that to happen. They have blame for that
23 as much as anyone. For them to say they have no path to
24 the funds is not accurate.

25 Also if you read the reliance instruction
4632

1 carefully, I think you will find that you are allowed to
2 find that there has been reliance, if the beneficiaries
3 rely -- and those are the individual smokers that we
4 started out talking about at the beginning -- the
5 individual smokers have unquestionably been affected by
6 the misleading statements that the defendants made.

7 They have been enticed into smoking when they
8 were kids; into using a product that's addictive before
9 they had any chance to know what they were getting into,
10 and before many of us had any idea it was even addictive.

11 Now they are smokers, now the tobacco industry
12 wants to blame them. We urge you, as you apply the
13 causation instructions, to recognize that you can blame
14 the individual smokers to some degree, but that the blame
15 in this lawsuit, in this courtroom belongs with the
16 parties who have never accepted the blame but who are the
17 prime movers of this, and much more than a substantial
18 factor, the tobacco industry.

19 Thank you.

20 THE COURT: We are going to take a lunch recess
21 at this time.

22 Over the noon hour -- we are going to stand in
23 recess until 12:40 -- the same rules apply. Don't talk
24 about the case among yourself nor with anyone else; don't
25 form any opinions or express any. Stay away from -- there

4633
1 are a lot of people in the courthouse today, stay away
2 from conversations. So don't get yourself in proximity to
3 somebody who's, you know, maybe talking about the case in
4 one fashion or another.

5 So until 12:40, we'll stand in recess.

6 Would the attorneys approach once.

7 - - -

8 (Luncheon recess.)

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1 TUESDAY AFTERNOON SESSION - MARCH 16, 1999
2 THE COURT: Please take your seat. At this
3 point in time, I'll call upon the defendants to make final
4 argument.

5 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANTS

6 MR. BERNICK: Good afternoon. You have been
7 called on to resolve an issue. It's an issue in this
8 case. That's why we are here is this case.

9 Now before we broke for lunch, counsel for the
10 plaintiffs was good enough to revive some of my drawings
11 from opening statement, and they got marked up a little
12 bit. So I've done my best to reproduce that chart right
13 here. And this chart does reflect the issue in this case.
14 The issue in this case is, have they shown wrongful
15 conduct in accordance with what the court now has given
16 you as instructions? Did that wrongful conduct cause the
17 plaintiff funds or their participants to, for there to be
18 more smoking, increased smoking beyond what would have
19 been? Have they shown an increased level of disease in
20 those participants, in this case? And has that increased
21 level of disease carried with it an increased costs? This
22 is the line of the issue in this case.

23 Now, this is what we talk about in opening, and
24 they have been good enough to come back on closing and
25 remind you of it. But the question is, what happened in

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1 between the -- was this the case that they reproduced
2 in-between, or was it a different kind of case? And
3 that's what we are going to review for you here this
4 afternoon a little bit.

5 I put some more circles on here and I'm going
6 to fill in a different set of circles.

7 Circle one is sale of cigarettes.

8 Good or bad? Should it happen or should it not
9 happen?

10 Does the sale of cigarettes increase disease
11 around this country, beyond what it would have been
12 without cigarettes?

13 Does that increased disease around the country
14 carry with it an increased cost? What should be the
15 policy here in the United States regarding the sale of
16 cigarettes, the diseases that are associated with them and
17 the costs that are associated with them?

18 That is not the issue in this case. We are not
19 here to decide whether it should be lawful or unlawful to
20 sell cigarettes, whether the sale itself is good or bad.

21 We are here to decide, was there specific
22 wrongful conduct? The wrongful sale of cigarettes? And I
23 ask you, which is the case that they have proceeded with,
24 was there any such thing as a sale of cigarettes that they
25 said was okay?

1 Beyond what Mr. LeBow has done in the last two
2 years, were there any sales in the 40s, 50's, 60s? Any
3 brand any advertising campaign, anything that was okay?
4 Or is the case that you heard, is this all bad?

5 Is the case that you heard that there was an
6 increase of disease beyond what there would have been
7 without cigarettes? Costs beyond what there would have
8 been without cigarettes?

9 We are here to talk about specific acts in
10 accordance with the court's instructions and whether they
11 have traced through a causal chain beginning with those
12 specific acts. That is the issue in the case.

13 There is a sea of evidence that you have now
14 seen, think of this as the rock of relevance that you grab
15 onto when you go through all these documents and consider
16 all of the testimony. Always come back what is the
17 wrongful act. They are complaining of does it comport
18 with the court's instructions and have they traced it all
19 the way through.

20 Now, the law tells you a lot about how to
21 address this issue. The law tells you that they must
22 frame their claims here in terms of specific types of
23 contentions.

24 You heard a lot of the labels for those types
25 of contentions in the instructions, but a lot of them boil

1 down to a handful of basic factual contentions.

2 Number 1, was there a scheme to defraud? The
3 scheme to defraud, as you'll see in the instructions and
4 as you have heard, the scheme to defraud would be a basis
5 for a wire fraud or mail fraud claim.

6 Was there obstruction of justice or tampering
7 with evidence? That could be another predicate act, a
8 specific contention that they would have to prove.

9 Was there a conspiracy? Again a specific
10 contention that they would have to prove. That's how the
11 law frames your consideration of this issue.

12 And this afternoon I, and then others, will
13 proceed in accordance with the law to review some of those
14 basic contentions.

15 I'm going to talk about the scheme to defraud.
16 Have they proved the fraud? Mr. Long is going to follow
17 and he's going to talk about scheme to defraud, but in
18 particular reference to CTR, the Council for Tobacco
19 Research.

20 Mr. Lerman then is going to talk a little bit
21 about advertising to kids. And you will see, as you may
22 have heard from the instructions, well, how does that
23 really fit in? Is there a claim that is really supported
24 by the allegations of advertising to kids? But we are
25 going to talk about that anyhow. Mr. Lerman is going to

1 talk about that. And then Mr. Weber is going to round up
2 the presentation, he's going to talk about conspiracy and
3 he's also going to talk about this issue of causation.
4 How does all of this relate to causation? Has there been
5 a harm and injury suffered by these funds and these
6 plaintiffs in this case as a consequence of some wrongful
7 act that has been proven up? That's how we are going to
8 proceed.

9 Now, before we get into the scheme to defraud,
10 I have a couple more comments about the law and the

11 instructions that are more general.

12 First, credibility. You heard the instructions
13 about the credibility of witnesses. It is your province,
14 and your province alone, to determine credibility.
15 Doesn't make any difference how smart those people are up
16 on the stand, doesn't make any difference how
17 distinguished their careers, you are the sole judges of
18 whether you take or discard what it is they have to say.

19 You can conclude that it is not relevant; you
20 can conclude that it's not helpful as expert testimony;
21 you can conclude that you don't buy it because you think
22 it is biased. That's credibility. That's your decision
23 and yours alone.

24 Now, the observation that I would like to make
25 beyond simply repeating what the court has said is to talk

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1 a little bit about the sequence that you saw of the
2 plaintiff's witnesses in this case.

3 We began with a group of people, Dr. Benowitz
4 was one, Dr. Parran was another, even Mr. LeBow, and I
5 want to come back to the tire people here in just a
6 moment. But you saw a group of people, they took the
7 stand, they testified on direct. And when they were cross
8 examined, which is the principal way of looking at
9 credibility, they admitted things; they admitted the
10 limitations of some of their testimony.

11 I've got one as an example here. Remember Dr.
12 Benowitz on this key issue of does it make a difference if
13 it's addiction or dependence or habit? He says, the
14 precise name that you put on it isn't the issue, as long
15 as you recognize that smoking can be difficult to quit?

16 Answer, he says that's right. The labels don't
17 make that much of a difference.

18 A very important point and he was prepared to
19 acknowledge it.

20 Let's take Mr. LeBow, the wheel. It's
21 interesting because, you know, before 1996 Mr. LeBow had
22 his own little tire and it was rolling down the same road
23 as everybody else's tire in this case, rolling, rolling
24 rolling, and it went flat. And the reason it went flat is
25 that his company wasn't doing so well. He knew that

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1 and he didn't become the nail until he reached a
2 resolution of some certain cases, that's when he became
3 the nail, because it was in his economic self-interest to
4 do so. And he admitted, he admitted that he didn't have
5 to pay a dime in order to resolve this case, and he was
6 here as a result of agreements to cooperate.

7 So, is he a little tire or a little nail? He's
8 still stepped up to what it is that brought him here to
9 court. He was frank on what brought him here to court.

10 But then we had a different group of experts,
11 and they were very distinguished people. They came in to
12 talk about exactly the same things the others had talked
13 about. Dr. Jaffe talked about safer cigarette research,
14 but then Dr. Harris talked about safer cigarette research.
15 Dr. Benowitz talked about addiction, but then Dr. Davis
16 talked about addiction too. What was going on? Why was
17 it necessary to bring these new people in and basically
18 say the same kinds of things all over again?

19 Now, the second group of people were pretty
20 distinguished; they were people involved in writing those
21 Surgeon General's reports. We almost had this image of

22 these very, very high powered people sitting around and
23 crafting these books that are so detailed and specific and
24 are the basis for framing the health policy in this
25 country for health. There is almost an aura from their

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1 distinguished careers in crafting these documents.

2 You might draw an inference from that. You
3 might draw an inference when they never gave up anything
4 on cross examination. Maybe what they had been doing for
5 the last several years, framing the public health policy,
6 was also a reason why they are here in this courtroom.
7 That they have an agenda, a public policy agenda, maybe
8 even a very sound one. That goes beyond the issue in this
9 case.

10 Maybe, and you heard this from Dr. Davis, he
11 believes advertising should simply be banned when it comes
12 to cigarettes. That's not before you. That's a question
13 of policy, it's not an issue in this case. You also heard
14 him say that he's not against the idea of maybe using
15 litigation to increase the costs to the industry so that
16 fewer cigarettes get sold.

17 Okay. Maybe that's his agenda, maybe that's an
18 appropriate kind of thing, but does it leave you to wonder
19 about his credibility when he addresses the particular
20 issues that we have in this case?

21 So when you think about the witnesses and you
22 think about credibility, think about why people are here,
23 think about their backgrounds that bring them here, think
24 about whether they are helpful in addressing the
25 particular issues that we are about in this case of

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1 credibility.

2 Second basic legal point; evidence. All of the
3 evidence.

4 After you get done thinking about
5 credibility -- credibility is a filter -- you then have
6 all this evidence, tons of evidence, use this as a
7 touchstone, but then think about something else.

8 We have seen that there is a lot of focus on
9 internal documents. Fair enough. We saw here again
10 today, those documents raise questions, there is no doubt
11 about it. We are not here to tell you that all those
12 documents were good. We are not here to tell you all
13 those documents represents sound thoughts, sound
14 decisions, correct decisions.

15 They raise questions. They prompt inquiry.
16 You might even be able to say, I can understand why a
17 lawsuit might have been brought, quality of some of those
18 documents, I can understand them. But we are not at the
19 point where we simply have a lawsuit being brought, we
20 have a trial. We are here not to talk about just a part
21 of the evidence, we are here to talk about all of the
22 relevant evidence.

23 Now, as you think about the cases, and you
24 think about that fact, how much of that full picture, how
25 much of the full truth did you hear from the internal

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1 documents as they were presented by the plaintiffs?

2 In opening statement, how much of the context
3 for those documents did you hear, or is what you heard
4 just document after document, question, question,
5 question, problem, problem, problem? How much of the
6 context did they supply when they called their witnesses

7 on direct examination? How much of the context did they
8 supply?

9 Q. And even today on closing you saw all the same
10 documents trotted out there; yet again, those hand- picked
11 select documents, as if nothing had ever happened in the
12 case. Was that a presentation of the full context? Was
13 that fair to the people who wrote the documents? Is that
14 an adequate picture of what was going on at the time they
15 wrote the documents?

16 The hallmark of their case, with what their
17 case turns upon, what they are putting to you, is that
18 those documents are not only the beginning, they are the
19 end of the question, they are the judgment in the case.

20 The world is much more complex, you have seen
21 much more in the way of evidence.

22 What is the hallmark of what we have done with
23 those documents?

24 A. We have shown you the other documents. I'm
25 going to review some of them for you here today.

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1 B. We put the people up on the stand who wrote
2 the documents and lived the history, and they were there
3 at the time. And we said, tell the whole story.

4 Now, those people were open to cross
5 examination. They could have asked them any question in
6 the world about that history. How much cross examination
7 really was there at the end of the day for most of those
8 people? How many of the documents that are so key to
9 their case were put up on the screen and said what is your
10 explanation of that? Or is what we saw, they were still
11 asked about some other documents they weren't personally
12 familiar with. If documents are here and they should be
13 here, they should be here for the way that they were
14 written. They were written by people with hopes,
15 aspirations and problems, leading their lives, trying to
16 answer their questions.

17 Judge, the people on the stand judge my
18 clients, judge the plaintiffs by the full compliment of
19 documentary evidence. Don't just keep on picking up those
20 pieces of paper and putting them out there.

21 Now, you will hear the argument. Well, why
22 didn't we show our documents to our experts? And I think
23 the observation was made at one point in time, geeze,
24 because we don't want them to see what the truth is, we
25 want them to kind of wear those blinders and not see the

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1 full picture, we are scared of what the documents might
2 show.

3 It would be pretty naive if we went into that.
4 Pretty naive if we could somehow escape from those
5 documents by not showing them to our experts. That's not
6 what it was all about.

7 The reason we didn't have them shown to our
8 experts is there is no way any expert can go back over
9 that history and talk to you about it in a meaningful way.
10 No way. The only people who can do that are the people
11 who were part of that history, and they were brought in
12 here to court.

13 Now, what happened when the plaintiff's experts
14 try to play that game? What happened when the plaintiff's
15 experts came in and was kind of laying your hands on the
16 documents and -- oh, I can tell you when, what this means
17 and what that means. Was that really helpful to you? I

18 want to talk to you about a couple of examples.
19 THE COURT: Counsel, stay at the podium unless
20 you are using the board.
21 MR. BERNICK: I'm sorry, your Honor.
22 Let's take a look at a couple of these. This
23 was a smoking and health proposal. It was a document
24 taken from our files. Smoking and health proposal was the
25 subject of testimony by Dr. Davis. And you may remember
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1 that he quoted from a part of that document where he said,
2 doubt is our product since it's the best means of
3 competing with the body of fact that exists. Remember
4 that? But then it turns out that there were other parts
5 of the document that pointed out, truth is our message and
6 we have to work with well documented facts.
7 So we have one of their experts bringing a
8 document before you and he quotes from part of it and he
9 doesn't quote from the rest of it.
10 But it was worse. What else did he have to
11 admit? Does he remember who wrote the document? No, not
12 off the top of my head. Whose files did it come from? I
13 don't know. Do you know whether it was actually issued
14 within the company from whose files it was produced? I
15 don't know.
16 Well, did anyone actually do any of the things
17 that are listed? I don't know.
18 How helpful is that? How much does that
19 provide the context? How much of that is the full truth
20 as opposed to just pulling out that piece of paper?
21 Remember also, Dr. Davis was the guy who had
22 that photograph, he said it was an ad, that it showed
23 Willie, remember Willie, with the kid, this little cute
24 five year old reaching for a movie or making, shaking
25 Willie's hand. And it's pretty suggestive and pretty
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1 powerful.
2 It turns out that wasn't an ad, that somebody
3 had wheeled a cardboard cutout of Willie over to the ad
4 and taken a picture, and this prestigious guy, Dr. Davis,
5 he shows you the photograph, he doesn't tell you any of
6 that. He doesn't even know where the photo came from or
7 why it was taken, or by whom it was taken. He just comes
8 in the court and up it goes.
9 How helpful is that in understanding documents?
10 How does that really reveal what the facts are? You have
11 then Professor Proctor. Professor Proctor also had the
12 same issue. Well, let's deal with project Airbus.
13 Project Airbus and project Aerial. This was Jaffe and
14 Harris, both Jaffe and Harris.
15 This was the project, one of the projects that
16 they said was a potential safer cigarette and was never
17 pursued. And again they used historical documents in
18 order to bear this out.
19 But it turns out that project Aerial, that was
20 pursued in the 1960's, ran into problems in 1966. This
21 was written in 1966, it's a plaintiff's exhibit. It says
22 the devices which have been made are still a considerable
23 way from being acceptable and easily produced, and it
24 would be misleading to underestimate the amount of effort
25 required to develop the devices to the required
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1 acceptability, both in smoke quality and production.
2 Then it turns out that Dr. Jaffe didn't know

3 anything that could have been done at the time to resolve
4 those problems. Didn't know how to resolve that
5 difficulty back in 1966.

6 Then you had project Airbus. Project Airbus
7 tried to take the aerial concept back in the 60s and
8 revive it in the 80s, and it ran into problems. It ran
9 into the problems with the kinds of materials that were
10 being used. Once again, Dr. Jaffe didn't know how to
11 resolve the technical problems with project Airbus. He
12 didn't know what the answers to those problems were. And
13 by the time it got to Dr. Harris, who talked about exactly
14 the same documents and the same facts, what did Dr. Harris
15 have to admit to you? Have you ever looked into what
16 happened to project Airbus to see whether it ever became a
17 feasible design concept? Answer no, I can't remember
18 looking specifically at Airbus documents.

19 When you bring the document in, when you trot
20 out these documents and recreate history, look what
21 happens to the experts. Are they really doing anything
22 more than what the plaintiff's lawyers are doing in
23 pulling the documents out, putting them up there and
24 saying see, isn't this a problem?

25 We declined to do that. We brought in the
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1 company people to talk about the company documents, we
2 brought in the experts to talk about the science.

3 Let's get to the first contention about
4 wrongful conduct, which is the scheme to defraud. And
5 that's what I'm going to talk about is the scheme to
6 defraud.

7 40 years of time are at issue here, they go
8 back to the early 1950s. And I ask you now, as you sit
9 here, after all of this testimony and all the experts have
10 spoken, if you were asked what's the scheme to defraud?
11 What's the master plan? Could you really articulate it?

12 They brought in economists, they brought in
13 historians, they brought in addiction experts, they
14 brought in doctors of all types to somehow tell you about
15 this master scheme to defraud. What was it? What was
16 that unifying element that carried throughout 40 years
17 that everybody in this entire industry, making every
18 single cigarette, paid all, clinged to all, to succeed in
19 accomplishing? I don't think you can identify it.

20 Now, there is a basic story of what occurred.
21 We are the ones who told you. The basic story is almost,
22 it is completely unrebutted in its basic structure. What
23 is the basic story here that does take us back to 1954?

24 Let's begin with the frank statement. Again
25 where they again -- here it is. Frank statement to
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1 smokers. Let me focus on a couple of things.

2 TIRC. There was a reference incidentally to
3 the fact that somehow oh BATCo was a party to this
4 statement. It was not. These were U.S. manufacturers of
5 cigarettes.

6 If we can go back to the -- let's see. We go
7 back to the title, we can see that the frank statement
8 contains a variety of statements. I'm going to focus on a
9 couple.

10 You will see back over here that there are some
11 specific commitments that are made. These specific
12 commitments to do CTR are going to be discussed by
13 Mr. Long. I'm going to talk about another part of the

14 document.

15 I'm going to focus you on the statements that
16 were made right here. We accept an interest in people's
17 health as a basic responsibility paramount to every other
18 consideration in our business.

19 That's a pretty powerful statement. I could
20 tell you that there is no evidence that anybody who's a
21 participant in these funds ever saw this document, ever
22 read the document, that none of the trustees ever did the
23 same. But I'm not going to focus on that for right now,
24 I'm going to talk about the commitment that we made and
25 what we did about it, because it is our basis. And had it

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1 said here, a responsibility paramount to every other
2 consideration, and the suggestion that has been made is
3 that this meant that there was a real conflict, that we
4 had to choose between our responsibilities to our
5 customers and our commercial interest.

6 The fact of the matter is, that choice was not
7 necessary for a very simple reason. Our marketplace.
8 Back in the 1950s, as a result of this information, our
9 marketplace was completely conditioned by the health and
10 safety issue. In order to sell to the consumer, in order
11 to meet consumer demand, we had to address the issue of
12 smoking and health. There was no conflict. There was
13 only one path, which is to figure out what to do with our
14 product to meet the demands of our consumers, of our
15 customers.

16 The story of how we satisfied the paramount
17 obligation is the story of product development. That is
18 the basic story in this case, and it's completely
19 unrebuted what we did to satisfy those obligations and
20 pursue product development.

21 Number 1, we did the chemistry research. You
22 heard the testimony from Dr. Townsend. He talked in part
23 about the effort to reduce constituents in smoke that were
24 felt to be potential culprits, that were felt to be
25 potential sources of increased risk. But then it turns

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1 out every time you identified one of those elements, a
2 study would come out that said, guess what? Benzpyrene
3 probably is not sufficient to produce the type of activity
4 noted in our animals, it is not the right way to go.

5 That was the problem with the chemical
6 research, it didn't consistently produce an indication of
7 some material the scientific community was saying was a
8 cause of smoking related illness.

9 Selected filtration didn't pan out. Then we
10 went to biological research. You have heard the story of
11 biological research, how different tests were used in
12 order to provide an indication of what might be safer.

13 Mr. Read told you about mouse skin painting and
14 the extensive activities that were undertaken in that
15 area. The basic problem was different tests gave
16 different results. There was an extraordinarily difficult
17 time in getting an agreement on any one test, and there
18 ultimately was never an agreement on any one test.

19 And the ultimate solution, after we looked at
20 chemistry and after we looked at biology, you have heard
21 this before, it was to reduce the overall deliveries of
22 smoke. And this was done with a vengeance, it was done
23 aggressively and done consistently. And that trend, those
24 moves, those changes, are completely without dispute in

25 this case. Those are measurements taken in accordance
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1 with FTC mandated methodology, and they represent real
2 progress in the product.

3 What did Dr. Benowitz say about this? He says,
4 I agree that these moves were all encouraged by the
5 scientific community. We went along with the
6 recommendations that were ultimately made.

7 Now, I want to get to the question of what the
8 plaintiffs say about some of these efforts.

9 We don't see an answer to the overall story.
10 We don't see them saying that this is wrong, but what we
11 see them do is to go back over 40 years and take out
12 issues and hold them up for you. This is one of them.
13 This is the so-called gentlemen's agreement, its a
14 statement out of the documents.

15 I'm going to go through some of those issues.
16 I won't have nearly enough time to cover them all. I'm
17 going to talk to you about what our answers are to these
18 issues. And I'm going to write them right here on the
19 board, but as I do I want you to ask yourselves two basic
20 questions.

21 Number 1, have they given you the whole
22 picture? That's number 1, have they done that? And
23 number two, is this really a scheme to defraud? Not
24 whether it was a mistake, not whether more could have been
25 done, was it a scheme to defraud somebody? That's the
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1 contention of this case.

2 What's the first claim? The first claim is the
3 claim about reluctant researchers. This is the claim that
4 said, in order to protect the conventional cigarette
5 business -- we didn't really want to go ahead and do
6 research, we were afraid it was going to undercut that
7 business; that's the claim.

8 You may ask yourself, what sense does that
9 claim really make? If we really wanted to protect the
10 existing business, why should we do research at all.

11 Q. Why should we spend all this time and money, why
12 should we hire people like Dr. Townsend or Dr. Carchman?
13 Why should we hire people like Mr. Read? Why should we do
14 that if we really wanted to protect our business? What
15 sense does it make?

16 Does it make any sense in terms of what the
17 marketplace was like? This is the scope of published
18 research. There are tens of thousands of research
19 projects being engaged in all over the country. Is there
20 any way that we could really control those? Does that
21 make sense at all?

22 Indeed, the research was taking place around
23 the world. How would our reluctant researchers have any
24 impact really on anything? What was the answer to that
25 question? And who were the reluctant researchers? Was
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1 doctor Dr. Townsend reluctant? Was Mr. Read reluctant?
2 Was Dr. Carchman reluctant?

3 Were they somehow holding back? What you saw,
4 as this team were pursued on the basis of a document here
5 and a document here, is that the research got done. There
6 was biological research at BATCo. It came over here to
7 the United States. There was biological research in the
8 United States done in connection with the tobacco working
9 group. There was biological research done at Reynolds.

10 There was there was biological research done through
11 Philip Morris, all kinds of biological research. Why
12 would it have been done if all we wanted to do was to
13 protect the conventional cigarette business? And as that
14 evidence emerged, you saw emerge holes in the testimony of
15 Dr. Jaffe.

16 We talked about the gentlemen's agreement.

17 He couldn't claim that there was an agreement
18 not to do biological research from '53 to '64. He said, I
19 don't know if that was one hole. Then he also admitted
20 what about BATCo? I don't know that they restrained their
21 research.

22 Then what about Premier? Was he aware of the
23 fact that there was a biological research for Premier? He
24 wasn't aware of that.

25 And finally, this was the most key. Do you
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1 really believe that it was clear that the industry somehow
2 could control all of this research being done around the
3 world?

4 Question: And they could not control the
5 research activities and the publications of others on the
6 issue of safer cigarettes, correct?

7 Answer: That's correct.

8 The world was far broader, the research was far
9 more extensive than anybody could control. Reluctant
10 researchers, hardly squares with the facts. And where is
11 the scheme to defraud?

12 We then get to marketing. The next claim was,
13 muzzle marketers. This was the claim that said, we wanted
14 to protect the conventional cigarette business, so we all
15 agreed that we would not make claims on the basis of
16 smoking and health in marketing new developments. We
17 would hold back on that kind of claim. Remember that
18 being said?

19 Again, ask yourself, what sense does that make?
20 Here companies spend tense and hundreds of millions of
21 dollars to develop new products, products like Premier or
22 products like Next or, God bless if we had ever succeeded,
23 products like Airbus Bus. We invested all this time and
24 all this money, and then we turn around and say, oops, we
25 are not going to talk about it. Why in the world would

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1 anyone want to do that? What could possibly account, if
2 we were going to do this, why try it all? If all we
3 wanted to sell was unfiltered cigarettes back in the 1950s
4 and we were not going to boast about what we developed,
5 why develop anything? What's the point?

6 In point of fact, there is only one explanation
7 that you heard for why it is that the marketing couldn't
8 make claims about smoking and health. It wasn't that we
9 didn't want to, it's that we couldn't. The FTC guidelines
10 said we could not. And boy, those guidelines, they were a
11 hot potato.

12 Doctor Jaffe, when he testified, mentioned
13 them, but ultimately he had to concede. Let me get
14 through a couple of other things here until we get to Dr.
15 Jaffe. Here we go. He had to concede that he was an
16 expert in the FTC guidelines. He couldn't talk about
17 them. He was an economist not an FTC expert.

18 Then he had Dr. Harris. And Dr. Harris took
19 the stand and talked about the same thing. But did you
20 even mention to them -- this is cross examination -- did

21 you even mention to the jury in direct examination, during
22 the entire course of your direct examination, that the FTC
23 commissioned guidelines governing cigarette advertising?
24 Answer: I didn't mention that. I mentioned
25 FTC, but I didn't mention any at all about the guidelines
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1 at that time.
2 You have read those guidelines haven't you?
3 Yes, I have.
4 He didn't want to touch them with a ten foot
5 pole. Dr. Scheffman -- Dr. Scheffman actually worked
6 for the FDC. He was Chief Commissioner for the FTC, and
7 he studied its regulations, after cross examination, after
8 Mr. Adelman went very ably after these guidelines. Let's
9 tell it like it is. Nobody wanted these companies to make
10 claims about health and cigarettes, ever, ever, ever. It
11 was off limits.

12 Let's get real. That's why the marketing was
13 muzzled, it was muzzled by the FTC. We wanted to market
14 it.

15 Then they turn around and say, gee, not that
16 you marketed too little, but that you marketed too much.

17 What about these ads that played in the 70s
18 that said, gee, why don't you switch down rather than
19 quit? Why could we do those and not the others?

20 Well, it turns out that the public health
21 community -- this is on the Surgeon General's report in
22 1981 -- had all kinds of cautions and all kinds of
23 qualifications. But in this case, when it came to
24 reducing delivery, the public health community said, if
25 you can't quit, if you can't quit, you should switch down.

4659

1 So those ads were okay with the government,
2 they could run. But the ads that wanted to do what they
3 said we should do, they couldn't run.

4 Maybe it's not muzzled marketing, maybe it is
5 muddled marketing. But the muddled marketing is not
6 something of our creation, it is a function of what we are
7 permitted to say.

8 What was the third on the list? The recent
9 revelations, you hear it again and again and again. Well,
10 now we know, it's now coming out. There are now documents
11 that say, how much have you learned from those documents?
12 What were the recent revelations?

13 Well, one was, reference to our historical
14 documents, indicating this is an interesting one. That
15 the documents were written back in the early 1970s, that
16 pH levels were going up, and the reason that Marlboro was
17 so successful is that pH had been raised, ammonia had been
18 raised, free base nicotine -- remember free base nicotine?
19 You heard about that again today. All based on the
20 historical documents.

21 The interesting thing about this one was the
22 same document that talked about Marlboro, talked about
23 Kool. And Kool is a product that my client makes. And
24 they say in this document the pH is going up with ammonia.
25 We didn't even have ammonia in our product in the early

4660

1 1970s, that pH wasn't a function of ammonia at all, it had
2 nothing to do with ammonia.

3 What ultimately happened with pH? This theory
4 that when you change pH the nicotine and the free base
5 nicotine increases? Well, ultimately, it turns out that

6 Dr. Benowitz, who offered this theory on the Winston or
7 anything else: Any other pH test they did, did you go
8 beyond that memorandum to see what was available that
9 year?
10 Answer: That year, no.
11 He never actually did a thorough review of the
12 data on pH, he never actually figured out, has there been
13 a big change in pH? What about free base nicotine? Well,
14 then he was confronted with the fact that studies have now
15 been done. This is a study done for the state of
16 Massachusetts.
17 These are the average pHs even in the last few
18 years. If you take a look at the best selling brands,
19 Marlboro and Marlboro Lights, they were at 6.0 and 6.1.
20 He couldn't even say there was a significant difference
21 between any of these pH levels. He couldn't account for
22 sales on the basis of ammonia or pH or free nicotine.
23 And then were those pH levels taken in 1996.
24 Any different from the ones back in the early 1970s? Had
25 there been a change in pH because ammonia was being used?
4661

1 The answer to that was no.
2 Back in the early 1970s, cigarettes made from
3 bright tobacco or blended tobacco delivered mainstream
4 smoke of pH below 6.2 and, consequently, contain only
5 small amounts of unprotonated nicotine. The results you
6 just saw in Massachusetts are almost exactly in the same
7 range. Over the past 30 years there has been no change in
8 the pH, no change in ammonia, free nicotine.
9 Now, in 1962, it was an inconsequential part of
10 smoke and hasn't changed since all those theory about the
11 manipulation of nicotine, pH free base. Where is the
12 data? Where is the data? Or is this just a function of
13 pulling out that 1973 document?
14 Then there was the claim, let's get to this
15 one. Remember, it was said here this morning, what about
16 that research that was done before 1964 about nicotine and
17 addiction? That wasn't sent to the Surgeon General;
18 another revelation.
19 You were quoted this document here, this is
20 19 -- February 13, 1962, the effects of nicotine proposal
21 for further research at Battelle.
22 And this is the one that says, as a result of
23 these various researchers we now possess a knowledge of
24 the effects of nicotine far more extensive than exists in
25 published scientific literature.

4662
1 Remember that? Pretty powerful. We knew more
2 than everybody else, and they strung that together with a
3 lawyers' document written a little bit later that says,
4 moreover, nicotine is addictive. We are then in the
5 business of selling nicotine.
6 And they suggested we know more, lawyers are
7 wise to it. They suggested that the decision was then
8 made to withhold disclosure of the Battelle report to the
9 TIRC members or SAB until further notice. And ultimately,
10 it was never sent to the Surgeon General. You heard that
11 reiterated this morning. Scientists know this now.
12 Lawyers don't like it. Lawyers cut it off at the path.
13 That was the claim.
14 Recent revelation? Just one problem. They
15 only gave you a part of the documents. It turns out that
16 there was an appraisal that was done in-between the time

17 of the original statement by the scientists, and the later
18 decision not to send the reports, an appraisal not done by
19 lawyers, but by scientists. This was it.

20 This says, Dr. Lieber was one of the
21 investigators for this work, agrees with this criticism.
22 And it is extraordinary that a scientist can report on a
23 series of experiments, and when questioned about their
24 validity, admit that they were not properly carried out.

25 The appraiser came in, he interviewed the
4663

1 people at Battelle, and they admitted the problems with
2 their research this great research that had been done.
3 What was the bottom line conclusion? The information of
4 these reports is not sufficiently complete to justify any
5 form of publication, June 21, 1963. That was the
6 assessment of the scientists, not the lawyers.

7 And there was a second telex. This says that,
8 incidentally, Dr. Benowitz has no basis to disagree with
9 the appraisal. There was another telex that they didn't
10 show you. This is the telex that actually reports the
11 decision not to turn the research over. It doesn't talk
12 about lawyers making the decision, it says, TRC consultant
13 scientists advise it is too early to submit Battelle
14 reports to the Surgeon General's committee, but we think
15 they will agree -- that is the scientists -- that
16 continuation by Battelle of this work would be useful.

17 Charles Ellis, the internal scientist who was
18 the biggest proponent of the Battelle work, the one who
19 wrote all the glowing things, he convinced of beneficial
20 effects of nicotine, but agrees further investigation
21 desirable before publication.

22 Every single scientist signed off on the idea
23 that the research was not of sufficiently high quality to
24 justify release.

25 What about that memo by the lawyer? It was
4664

1 after the fact. That's dated July 17 of 1963. So once
2 again we get the experts who take the stand, they pick out
3 what they want. They are telling you about these
4 documents, they are telling you the history, saying they
5 have got the full truth here.

6 What about the statement that, you know, it
7 also turns out that more information was transmitted to
8 the Surgeon General. This is dated March of '63 to the
9 Surgeon General. It is in evidence. And a lot of the
10 effects that were observed by Battelle were picked up by
11 other articles reporting on the same effects, and they
12 were sent to the Surgeon General in March of 1963. Nobody
13 was concealing the effects of nicotine.

14 What about the fact that the word nicotine and
15 addictive is used in those documents before the '64
16 report? Was there some secret that nicotine had addictive
17 properties?

18 Dr. Benowitz admits that there were people in
19 the scientific community who expressed the view that
20 nicotine was addictive before 1964, and he's right. There
21 are articles in evidence, this is one, that specifically
22 talk about the addictive aspects of heavy cigarette
23 smoking before 1964.

24 Here is what they say: Heavy cigarette smokers
25 thus appear to be true addicts."

4665

1 And this article not only came out before '64,

2 the tobacco industry sponsored it's publication. Where
3 was the secret? What is the significance of this new and
4 terrific revelation that's taken place?
5 Vent blocking. Remember the people cover over
6 the vent holes and it means that they get more nicotine
7 and more tar? We had to introduce the evidence and the
8 data that says that's not a problem, and it's been studied
9 why were they telling you, why weren't they telling you
10 about that kind of research? What about the claim that
11 somehow we are in the pharmaceutical business? Remember
12 that one? Gee, these companies are in the pharmaceutical
13 business.

14 Well, it turns out the reason we got into the
15 research of looking in the pharmacy of nicotine was that
16 the National Cancer Institute scientists asked us to do
17 that, as did the Surgeon General of the United States.
18 These are minutes of the National Cancer Institute
19 meeting. We are there, and people from the National
20 Cancer Institute are there.

21 Cooperation with the government. This was a
22 cooperative program pursued for 10 years. Surgeon General
23 says, we should look at cigarettes with altered nicotine
24 and tar ratios.

25 Moving to another category. Anxious attorneys.
4666

1 I'm not sure everybody can see. It says anxious
2 attorneys. A lot of those are around. Especially today.

3 A lot of evidence that's been suggested to you
4 about anxious attorneys, attorneys who were too active,
5 too involved, people who have got documents that pertain
6 to that subject, not only myself but others will address.

7 I'm going to talk to you about a couple
8 incidents that relate to my client, because I think what
9 you are going to see, once again you have to look at the
10 whole truth, all the evidence, before you come to easy
11 conclusions.

12 There was the document here, this is the
13 Harrogate program. Remember the tobacco industry in
14 Britain set up a research program in England at a lab
15 called Harrogate. This is where mouse skin painting work
16 was done.

17 Mr. Read testified about it, and there were
18 documents that you saw where lawyers expressed concern
19 about publication of the results, from the results of the
20 Harrogate research in Britain. This was one of the
21 documents. Then it turned out, lo and behold, that the
22 Harrogate results were published in the British Journal of
23 Cancer, and in fact, they made specific findings that were
24 favorable to mouse skin painting that is intended to
25 confirm the value of mouse skin painting research. It was

4667

1 published in peer review journals, and the findings that
2 were made were exactly the findings that the lawyers had
3 earlier expressed concern about.

4 So, yes, the lawyers are anxious, they are
5 worried about what's coming up. But did it go forward as
6 research, yes, it did. Was it published? Yes, it was.
7 Was the publication true to the research and unfavorable
8 to us? Look at the lawyer's own documents. Yes, it was.

9 Again, all the documents need to be looked at
10 in order to ascertain whether the one that's been picked
11 out is a fair representation.

12 Here is another one. Remember the issue about

13 whether Brown & Williamson got the BATCo research reports?
14 Remember that one being pursued? Another one -- well,
15 BATCo says, doing all the research, but did we get it?
16 And they showed you documents suggesting that somehow,
17 this is 1979, it was necessary to maintain these documents
18 in the Law Department and claim that they were privileged
19 and protected. Remember that?

20 But it turned out that the plaintiffs own
21 documents, six years later, showed that those research
22 reports, and this is a very poor copy, talked with Earl
23 Kohnhorst something about the scientific documents are in
24 the R&D Department now.

25 This was the document that was introduced to
4668

1 say, gee, were they shipped abroad? But it turns out
2 they are not in the Legal Department, they are in the
3 Research and Development Department, where they belong.

4 Now, they said, well, gee, this is 1985 and
5 doesn't -- this document proposes sending the research
6 reports back to England. And remember I asked their
7 witness: Do you know that they were sent back? This is
8 Dr. Harris. Did you look into whether they were really
9 sent back, or are you just referring to a document? He
10 couldn't answer the question.

11 In fact, the whole situation was audited. An
12 audit was done comparing what BATCo reflected that we got
13 at Brown & Williamson, and then compared it with what was
14 actually in the library. And these are documents that are
15 in evidence that shows from 1957 to 1992 there were no
16 less than 1900 reports that were sent over. Only 94 of
17 them in that whole period of time can't be located. And
18 if you take a look at the period of time after November,
19 '79 which is the date of that memo, only four out of 478
20 reports can't be located.

21 Are they somehow incredibly sensitive in their
22 topics? They are a bunch of things. So again, the claim
23 is made, not borne out. Why do we continue to see these
24 documents used on closing?

25 Finally, I want to come to the issue of the
4669

1 public position of these companies on causation.

2 All of these issues are issues that you have
3 seen, that you have seen addressed. None of them, A, are
4 true, B, even begin to rise to the level of a claim that
5 there was somehow a scheme to defraud, that somebody was
6 misled.

7 We have shown you the answers to each and every
8 one of them. You have seen us pop up and do it during the
9 course of the trial; we'll continue to do it. These are
10 serious questions raised by the documents. We step up to
11 that fact, but we believe when you take a look at those
12 facts, including claims when they are saying attorneys
13 were running the show, we know that that gets people
14 excited.

15 Look at all of the evidence before you come to
16 your conclusion. Think about those people who took the
17 stand for the companies, and we were prepared to address
18 it all.

19 Let me talk a little about the company's public
20 position.

21 Just got to keep track of my time here because
22 we have an allotment of time.

23 The company's public position is a matter of

24 importance in this case, and it is a matter of importance
25 beyond this case. They are using it here to suggest that

4670

1 after all that was done in the way of product development
2 and research, all the steps that were taken to make sure
3 that our advertising was right, that all of it should
4 basically be set to one side because of what was said
5 publicly about the issue of causation. Somehow it just
6 wipes the slate clean of everything that's been done since
7 1954; nullifies it all.

8 I want to talk a little bit about what this
9 position was, why we took it, and the support that we have
10 for it, and whether in some fashion it rises to a scheme
11 to defraud anybody after 40 years of intense public
12 scrutiny.

13 What was the position? Well, you have seen the
14 plaintiff's experts characterize the public position.
15 Remember the fluid testimony of Professor Proctor? He
16 said, gee, if you take a look at it, we have said
17 perfectly safe. Remember his testimony, cigarettes,
18 repeatedly perfectly safe. Never said in the context of
19 the documents that we are talking about here after 1954.
20 Where is the evidence we said the stuff was perfectly
21 safe?

22 If you take a look at the frank statement
23 itself, and I think I will get there on the screen. We
24 say we believe the products we make are not injurious to
25 health. That's what we said in 1954. Even that went

4671

1 further than what emerged as our position. After 1954,
2 after the frank statement, the position that was taken by
3 this industry is not that cigarettes are safe, certainly
4 not that they are perfectly safe, not that they are not
5 injurious; the position that was taken was, that there are
6 gaps in what has been known and developed in the science,
7 and that those gaps are significant gaps. That is the
8 position that's been taken.

9 And I think if you take a look at the documents
10 you will see, first of all, that in 1954 when we made this
11 statement Dr. Jaffee was prepared to recognize that there
12 was an honestly held belief at the time. That was his
13 testimony.

14 After the statement was made, this is a
15 statement of 1954 after the frank statement. We are no
16 longer saying not injurious, we are saying statements of a
17 definite and final nature concerning the relationship, et
18 cetera, are at the present time premature if they leave
19 the impression of conclusive and complete coverage of the
20 relationship.

21 Since 1954 a whole series of statements have
22 been made. We are going to talk about them here in a
23 minute. But this is the essence of the position that's
24 been expressed. Sometimes the position has been very
25 clearly stated. The question about smoking and health is

4672

1 still a question. It is basically a statement about
2 things that are not known other times, and we'll step up
3 to it. There were statements why we are dropping the New
4 York Times, and the text of this went too far. And I
5 think we had said it went too far, but it was isolated.
6 The basic position is the one that is expressed here,
7 smoking and health is still a question.

8 You heard in this courtroom basically the same

9 testimony. Is it an easy position to articulate? No.
10 It's not a clean yes or no answer. People who want to
11 know does it or does it not? It's not the kind of answer
12 that we have.

13 And we stepped right up to it, you heard it
14 from the stand, you would hear it again if you asked
15 again, it is a statement about the state of science is
16 important. Why? Because we have to deal with modifying
17 the product, and until we know the constituent of smoke
18 that's involved, until we know the mechanism that's
19 involved, we are shooting at a moving target. It's a
20 fact. We would love to change that fact. We haven't
21 figured out how to change that fact in 40 years.

22 Do we minimize the risks that are associated
23 with smoking? We do not. Nobody took the stand to say
24 that the risks of smoking are somehow minimal or
25 inconsequential. The Surgeon General of the United States

4673

1 handled public health policy. Nobody took the stand in
2 this courtroom to say that somehow what the Surgeon
3 General is doing is wrong. All we are saying is a
4 statement about the science.

5 Do we have support for this statement? The
6 support has varied over time. Back in the 1950s we had
7 some support from people who were independent of the
8 industry. I don't have time to review it all. But before
9 the 1964 report there were a variety of scientists who
10 believed, as we did, that there was still an open
11 question. Remember on cross examination of Dr. Proctor I
12 showed you the statement of the Surgeon General himself in
13 1957, saying, I can't go further than to say that the
14 evidence strongly suggests -- remember that? Not prepared
15 to make the statement that it had been established, 1957.

16 By 1964 the matter was still controversial
17 enough there had to be a cigarette report. And the
18 cigarette report itself said this matter is still
19 controversial.

20 Let me pull that up for just a moment.

21 This is the 57 document, because I'm not quite
22 there. This is out of the '64 report. The causal
23 significance of an association is a matter of judgment
24 which goes beyond any statement of statistical
25 probabilities.

4674

1 So we are talking in 1964 about a judgment, was
2 that somehow a slam dunk even in 1964? Read on. Various
3 meanings and conceptions of the term cause were discussed
4 vigorously at a number of meetings of the committee and
5 its subcommittees. This remained a subject of debate even
6 in 1964.

7 In order to resolve this issue what had to
8 happen? They had to adopt -- this is doctor Proctor
9 himself testifying -- they had to adopt a whole new test
10 of causation in 1964 in order to reach the conclusion. A
11 whole new test of causation.

12 So from '54 to '64 there were not only
13 independent scientists who were saying it hasn't been
14 established, but even as of '64 the test was not there in
15 order to say causation; they had to develop a new one.

16 What's happened since 1964? Well, you have a
17 different judgment made by the Surgeon General in '64, but
18 the gaps still remain. Where has there been anybody who
19 has taken the stand for any side, I can tell you the

20 constituent of smoke that causes disease? Nobody's done
21 that.
22 Where has anyone taken the stand that says I
23 can tell you the mechanism by which causation takes place?
24 Nobody has done that either. These are unions, they
25 remain a fact, and they affect our business. And we point
4675

1 them out because they are accurate statements. Not a
2 single one of those statements has been disputed in this
3 court.

4 THE COURT: You used an hour.

5 MR. BERNICK: I'm sorry?

6 THE COURT: You have used an hour.

7 MR. BERNICK: I'll conclude in five minutes.

8 THE COURT: Doesn't matter to me.

9 MR. BERNICK: What is it why we are doing this.
10 Why is it so critical and of such great importance that we
11 do this causation position. Some people have said and
12 pointed out, there are documents that talk about, gee,
13 it's all a question of legal position. It's a question of
14 legal strategy, it is true that we have taken the position
15 in court that causation has not been demonstrated that is
16 accurate.

17 But the statements that are being attacked
18 here, these statements that were shown to you on the
19 poster board are public. The statements that they were
20 complaining about are what's been said publicly. If you
21 take a look at those public statements, do you see that
22 somehow they were designed for legal purposes?

23 No, if you take a look at this list what you
24 find out, that basically these are mostly press releases.
25 You have a total of only 58 or 56 statements over 40
4676

1 years. They are not in cigarette ads, they are not, you
2 know, directed to the consumer in the form of cigarette
3 ads. Overwhelmingly, they are press releases. And
4 they are press releases that happen to correspond to
5 points in time when legislation is being taken up. When
6 something has been considered by way of further regulation
7 of the industry.

8 And what do these statements really say? Why
9 is the position being stated publicly that they are
10 complaining about? Because when regulations are proposed
11 to set ceilings on tar or nicotine, or say that some other
12 constituent like carbon monoxide is the culprit, we have a
13 right to speak to the public issue. We have a right to
14 state our position in order to affect the regulation of
15 this industry.

16 That's why we are issuing press release, that's
17 why we are showing up at meetings and making statements.
18 We are participating in a process that's been recognized
19 and respected in this country for 200 years, which is to
20 speak out in order to affect public opinion in order to
21 affect the development of political philosophy and
22 political action.

23 And when we speak out, the real question is,
24 not just why, but do we say anything that's false? Have
25 we misrepresented a fact in any one of those ads? Have we
4677

1 misrepresented them? Have we concealed some secret in any
2 one of those ads?

3 What's the secret after all this period of
4 time? What is the treasure trove of knowledge that is

5 somehow concealed in these ads? They can't find it. Much
6 as you try, whether it's the public position, or it's the
7 selected documents, if you look for a scheme to defraud
8 you will find controversy, you will find complex problems,
9 but you will not find that this industry has actually gone
10 out and mislead anybody. Nobody has been mislead in this
11 process.

12 Thank you, your Honor.

13 MR. LONG: Good afternoon ladies and gentlemen.
14 You haven't heard much from me during the last three
15 weeks, and I assure you that is not going to change much
16 this afternoon.

17 I'm here to address two quick topics. First is
18 TRC, counsel for top research; and the second is my
19 client, Lorillard. We haven't heard much about Lorillard
20 in the last three weeks.

21 The first thing I want to talk about on CTR is
22 this issue of dependence? You heard plaintiff's attorney
23 say CTR was somehow fraudulent because it was not totally
24 independent. Let's look at the source of the document
25 that first started the ball rolling on the CTR, and you

4678

1 have seen it many times in this trial. I think probably
2 the 11 of you have seen this more times than anybody who
3 saw it when it was published 45 years ago.

4 If you recall Dr. Rubin when I asked him, when
5 he was in medical school, when this was published in 1954,
6 and I asked him if there was a buzz or big discussion
7 about the frank statement. Then he laughed and said, you
8 got to be kidding.

9 So again, we have had a lot of attention paid
10 to this, but there was not a lot of attention according to
11 the evidence paid 45 years ago.

12 But the point is that the companies did live up
13 to the frank statement.

14 And let's look at the issue of independence.
15 And what the company said about the dependence of the
16 frank statement.

17 And if you look at this, the company said, we
18 are going to fund research, it is their money, they are
19 funding it. The funds come from them, and we are going to
20 make a joint industry group. So it's a group that
21 they are joining together.

22 Now, I'm not going to sit up here, stand up
23 here and tell you that it is totally independent. They
24 started it, they own it, they funded the whole thing.
25 Obviously you can't argue that it is totally and

4679

1 separately independent, CTR as a whole.

2 But the key to the independence issue comes in
3 on the Advisory Board they set up here. They did say they
4 would have an advisory board of distinguished scientists
5 who would be disinterested or independent of the tobacco
6 industry. That's the independent part of CTR, the
7 Scientific Advisory Board. And I think the evidence shows
8 that that's exactly what the companies did, they followed
9 through and had an independent advisory board.

10 Now when we are talking about CTR in this case,
11 there is really only one witness who has addressed CTR in
12 depth, and that was Dr. Emanuel Rubin.

13 The plaintiffs like Dr. Rubin. They show you
14 his picture, they read you his book, they apparently think
15 Dr. Rubin is very credible. So do we.

16 Dr. Rubin is the only witness in this case who
17 went through the trouble to go back and look at the CTR
18 documents, to look at the research grant process, the
19 research that was funded, the research that was published,
20 the journals it appeared in, the scientists, the
21 co-funders, the only witness in the whole case to do that.

22 And then he comes to us and give us his
23 opinions, and plaintiffs believe Dr. Rubin is very
24 credible. They quote him almost as I do. They didn't
25 tell you his bottom line opinions on CTR. And let me

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1 remind you what Rubin's opinions were.

2 This was the first of his opinions. The SAB
3 directed funding program for research grants was performed
4 in an exemplary fashion, and the results of that program,
5 in terms of the research, was outstanding.

6 That's one of Rubin's opinions.

7 Another opinion, in general, the investigators
8 who carried out research sponsored by CTR were among the
9 finest scientists and physicians in the United States and
10 performed outstanding work.

11 And the last of Dr. Rubin's opinions about CTR,
12 in terms of the quantity and quality, the results of the
13 research were exemplary, were published in the very best
14 journals of the United States, and indeed internationally
15 and.

16 If you recall, Dr. Rubin went through a list of
17 the co-funders, the institutions like NIH who had also
18 contributed to the same research. And he went through a
19 list of the institutions, such as Case Western Reserve
20 here, which had received funding. And all in all that's
21 basically what Dr. Rubin said about CTR was that it was a
22 fine organization, and that over the years it had spent
23 over 300 million dollars funding over a thousand
24 researchers that resulted in over 6,000 published articles
25 in the scientific literature.

4681

1 And Dr. Rubin also pointed out, and this is
2 uncontroverted, that the Scientific Advisory Board, that
3 funding constituted 95 percent of the total funding of
4 CTR.

5 Now the plaintiffs are claiming that CTR was
6 somehow a fraud because there was a public relations firm,
7 Hill & Knowlton involved in the very beginning, and
8 because lawyers were involved.

9 Ladies and gentlemen, that was no fraud, that
10 was no secret. That was known to everybody from the get
11 go on CTR.

12 I have here, this exhibit will go back in the
13 jury room with you. And I'll quickly explain to you what
14 it is. This is a letter to the Department of Justice,
15 January 26, 1954, from the chairman of what was then the
16 TIRC. What's now the CTR. And the chairman was
17 responding to this gentlemen at the Department of Justice,
18 to questions that were raised about TIRC. And in this
19 letter, as you go through it you see on page 6 where it
20 clearly stated that the committee, TIRC, has employed the
21 firm Hill & Knowlton. This is no secret. This is no
22 fraud.

23 To go further back. The TIRC has put together
24 this limit of power, is what TIRC could do and couldn't
25 do. If you notice here, one of the things they believed

4682

1 they could not do was to participate in any activity or
2 give consideration to any matters affecting the business
3 conduct or activities of its members.

4 And if you go on down. They make clear that to
5 this end the committee is proceeding under the advice of
6 legal counsel. Selected from among the counsel are
7 nominees of its members.

8 There is no secret that there were lawyers
9 involved. This here, about participation in activities
10 that affect the business, this meant that they could not
11 get into work that had commercial overtones, work that was
12 proprietary, product development.

13 And Mr. Coughlin showed you this letter from
14 Dr. Sommers, which had the reference to legally permitted
15 tobacco research. The new name for CTR, if you look up
16 above to what he didn't tell you, the lawyers had raised
17 anti-trust law concerns with CTR. These anti-trust law
18 concerns are the very type of concerns addressed with this
19 competitive activity back in 1954 that went to the
20 Department of Justice.

21 So there was no secrets about the lawyers
22 involved, no secrets about we do have special projects.
23 And Dr. Rubin researched the special projects, went back
24 and read all the articles about special projects. And he
25 told you the lawyers did have a role in selecting this
4683

1 research.

2 Special projects was separate from the SAB
3 work. The SAB work, 95 percent of the funding was over
4 here, special projects was over here. Dr. Rubin went
5 through all the work that was done as a special project
6 and he testified that, just like the SAB work, special
7 projects funded good scientists, they did good research
8 relative to smoking and health, and it was published in
9 great scientific journals.

10 And nobody has come in here and told you that
11 special projects was used to hide or destroy any specific
12 time of research. We see these broad allegations.

13 Now, when Dr. Rubin testified, plaintiff's
14 counsel showed him document after document after document,
15 internal documents from the tobacco companies.

16 Dr. Rubin basically said, that's not important
17 to my opinion. I'm interested in the output, what
18 actually went out of CTR rather than what people would say
19 about it.

20 And it's clear, ladies and gentlemen, if you
21 look at those internal company documents, there was from
22 time to time continued discussion, continued disagreement
23 over C R, what CTR should be doing, what it shouldn't do.
24 Was it too independent? Was it not independent enough?

25 But ask yourself, if the tobacco companies had
4684

1 total control of CTR and the SAB, why didn't they simply
2 change the direction rather than sit around and talk and
3 debate. They didn't because they couldn't. SAB, the
4 Scientific Advisory Board, directed the research
5 activities in the course of research for CTR.

6 And I think you will see that even as these
7 companies continued to internally debate what happened at
8 CTR, the SAB continued to the fund good research, relevant
9 research, and it was published in good journals.

10 And you will see, as the plaintiffs admitted
11 and it was shown last Friday, over the course of the

12 years, the Sixth Circuit's reports, the documents that the
13 plaintiffs rely on heavily, have cited hundreds of
14 publications that were the result of funding by CTR.

15 The plaintiffs can tell you that this research
16 was not relevant and that it was concealed, but the people
17 who write the Surgeon General reports didn't have any
18 trouble finding it, and they obviously thought it was
19 relevant. And that alone should establish the validity of
20 CTR.

21 I briefly want to talk about my client,
22 Lorillard. Again, you haven't heard much about Lorillard
23 in this case, and if you remember three weeks ago I asked
24 you on opening to listen carefully to specific evidence
25 about specific defendants.

4685

1 So when you get back to the jury room think
2 about what you have heard about Lorillard. The plaintiffs
3 have almost ignored Lorillard. They have almost ignored
4 their burden of proof to prove their claims against
5 Lorillard. The worst proof of Lorillard being involved in
6 mail fraud or wire fraud, any specific mailing or wire
7 into the State of Ohio, wired in by my client, where is
8 any proof of Lorillard involved in any evidence tampering
9 or any obstruction of justice.

10 Remember, Lorillard, according to the
11 Plaintiff's conspiracy theory, is a an integral part of
12 this conspiracy, and if the proof fails as to Lorillard,
13 then so goes the conspiracy theory.

14 Now, the plaintiffs have said that my client,
15 like others, targeted minors, targeted youth with their
16 advertising. But what documents have they shown you here
17 is one that they through up today. This is the document
18 that talks about Newport and the fact the base of the
19 business is the high school students.

20 This is not a good statement. I am not going
21 to defend this statement. But ask yourself, is this a
22 marketing plan from Lorillard? Is this a document written
23 by a marketing executive, somebody who's taking polls or
24 planning the advertising? No.

25 You look at this, this person was reporting on
4686

1 his sales figures in field three. And field three was,
2 obviously if you look at the very bottom somewhere, near
3 Mt. Laurel, New Jersey, this man was a Sales Manager
4 sending in his figures and making some comments. Again,
5 it is not a marketing plan, and plaintiffs have submitted
6 no evidence to show that my client targeted youngsters
7 with any Newport ads, or any other ads.

8 Here's another document showing how my client
9 targeted youth. This is a school bus driving by a Newport
10 Lights ad. And I suppose plaintiffs would have you
11 believe that people at Lorillard spent weeks combing the
12 country and analyzing statistics to find out where the
13 school bus passes so they could target the kids on this
14 bus.

15 This picture doesn't show much. The couple on
16 the other document is the best they have to show against
17 Lorillard, and it doesn't have anything to do with
18 targeting of minors.

19 They claim Lorillard was a part of this
20 so-called gentlemen's agreement not to work in-house and
21 not work on safer cigarettes. But what's the proof been
22 in this case?

23 The only witness who testified much at all
24 about Lorillard's conduct was the first witness, Professor
25 Jaffe. And I asked professor Jaffe just a few questions.

4687

1 And one of the questions I asked him was: Wasn't it a
2 fact that he had not seen a single Lorillard document that
3 referenced any type of gentlemen's agreement. And he
4 agreed not a single document.

5 And we talked about the fact above that. That
6 the work that Lorillard was doing in-house was not
7 consistent with any agreement not to do in-house
8 biological work.

9 And we also talked about the fact that
10 Lorillard had been doing in-house testing on phenols,
11 which the public health community had labeled as
12 dangerous.

13 Lorillard patented this research. Lorillard
14 gave this work to the Surgeon General before the 1964
15 report. All of this conduct, testified to by plaintiff's
16 witnesses, is totally inconsistent with any theory of
17 conspiracy on a gentlemen's agreement.

18 That's basically what we have in terms of
19 Lorillard here. We have that testimony by Dr. Harris,
20 these are the 9 Lorillard documents the plaintiffs have
21 put into evidence. Look at these documents and see if you
22 can find evidence of mail fraud, wire fraud, or evidence
23 of tampering or obstruction of justice.

24 If the plaintiffs have evidence I'm sure they
25 will point it out to you.

4688

1 Thank you very much.

2 MR. LERMAN: I needed a little extra space.

3 Good afternoon, ladies and gentlemen.

4 I've got a half hour to talk to you. And do me
5 a favor, if you see Mr. Weber extend a big hook to make me
6 sit down, give me a signal.

7 I'm going to talk to you about advertising.
8 Mostly I want to talk to you about some issues that are
9 particular to my client, Philip Morris, and I'm going to
10 get right to it.

11 Advertising. I want to pick up where
12 Mr. Bernick left off in terms of what this case is about.

13 This case is not about whether cigarette
14 advertising should be legal or banned, that's not the
15 issue in this case.

16 It is legal, it's regulated by the FTC, it's
17 been regulated by the FTC since 1955. This case is not
18 about whether or not cigarette advertising can or cannot
19 be effective in communicating a message to smokers. It's
20 lawful to advertise effectively.

21 And this is not a case about whether youth
22 smoking or under age smoking is or is not a good thing.
23 It is not a good thing, it is not a topic to be
24 trivialized.

25 The issue that the plaintiffs have to prove in

4689

1 this case, pursuant to the mail fraud allegations that
2 they have made, and the instruction that you need to pay
3 attention to in analyzing these youth marketing claims,
4 are the mail fraud instructions.

5 The issue that the plaintiffs have to prove to
6 you is that somehow our advertising violated mail fraud
7 law.

8 And you are going to look at those mail fraud
9 instructions, you saw them this morning, you will see them
10 later. Ask yourselves where in the mail fraud statute it
11 talks about targeting advertising that's regulated by the
12 Federal Trade Commission.

13 How does that violate a statute that's been
14 raised in this case?

15 Now, ladies and gentlemen, the plaintiffs
16 claimed that we target kids with our advertising. Let me
17 stop on the word target. Target means that we design
18 intentionally, craft and strategizes our marketing to get
19 to kids who are under age and below the lawful limit to
20 smoke. They say that we do that, and they say that
21 advertising is therefore effective in getting kids to
22 smoke.

23 That's their two part proposition. And I want
24 to start, we have heard a lot about this before. I want
25 start with that second premise, that advertising somehow

4690

1 gets people to smoke. I am not going to review for you
2 the well established literature, the well established
3 independent science from the FTC, from the World Health
4 Organization, from various journals on marketing.

5 The overwhelming consensus that advertising
6 doesn't affect consumption, I'm not going to review that
7 with you. You have seen it you know about it. I'm not
8 going to review with you the ad ban studies that have
9 shown that limitations on advertising in foreign countries
10 have no discernible effects on consumption. You have
11 heard all about that.

12 I want to talk to you about a couple other
13 things that came up during the trial that I haven't had a
14 chance to talk to you about. The first one is the
15 testimony of Dr. Cloninger, who was the doctor from St.
16 Louis, the psychiatrist. He spoke during his testimony
17 about motivations for people smoking, why they smoke. And
18 he came up with three reasons, peers, parents, and
19 personality. Three reasons.

20 And it was interesting testimony, because what
21 Dr. Cloninger said was the motivations for smoking start
22 with social values, with what you learn in your home and
23 from your parents, with the circle of friends that you
24 travel with and the social situations that you find
25 yourself in your job, your schooling. But he also talked

4691

1 about personality; your desire to experiment; your
2 curiosity to find out about something like smoking; your
3 desire to try something different or to take a risk. And
4 for kids, experimentation and curiosity is an important
5 reason why a kid would decide to take that first puff.

6 Think about a 15 or 16 year old, a 17 year old,
7 an 18 year old, still deciding to take that first puff.
8 And Dr. Cloninger spoke about that with -- what I found
9 interesting about Cloninger's testimony, there wasn't a
10 single cross examination question raised by the plaintiffs
11 to Dr. Cloninger's testimony regarding why people smoke.
12 Not one cross examination question.

13 He never mentioned advertising as a significant
14 factor. He never mentioned advertising at all. Not one
15 question from the plaintiffs.

16 And there is something else I want to talk
17 about. Why don't the plaintiffs want to talk to you?
18 When they talk about why people smoke and the effect of

19 advertising on smoking, why don't they want to talk to you
20 about the polls and the interviews with smokers where the
21 question is directly put to people, why did you start
22 smoking?

23 We showed you the Gallup polls and the Zinser
24 poll. I'm going to show you the results of those polls in
25 a second. Adults, adolescents, the results are always the
4692

1 same. You ask smokers why did you start smoking? And
2 they respond with different reasons, family, peers,
3 curiosity, almost never advertising.

4 In fact, Lucy Henke testified that she reviewed
5 over 50 depositions in this case where the trustees who
6 smoke were asked under oath, why did you start? These are
7 the plaintiffs in the case. And only two out of 50 or 51
8 mentioned advertising, and those two mentioned advertising
9 and also mentioned other factors.

10 Advertising. When people are asked why they
11 start smoking advertising is not the reason. Why? Is
12 that not where we are focusing our attention on the effect
13 of advertising in this case? Why is that ignored
14 consistently by the plaintiffs in this case?

15 Ladies and gentlemen. The problem with
16 ignoring what people have to say about advertising maybe
17 came out best in Dr. Harris's testimony. Remember Dr.
18 Harris told the humorous story about how he started
19 smoking. He was playing poker in college with some
20 people. They thought he looked like John Paul Domondo.
21 He was smoking a French cigarette, started smoking for
22 years. Advertising had nothing to do with Dr. Harris
23 starting smoking as a college student.

24 Something about Dr. Pierce said how medical
25 students don't smoke. Dr. Harris, that's real world, real
4693

1 people talking about why they smoke. And that leads me to
2 talk about the one person in this case who stands alone in
3 the literature, stands alone in his conclusions, separates
4 himself entirely from the body of research and work that's
5 been done on this issue, Dr. Pierce.

6 Dr. Pierce ignores the basic question to
7 people; why did you start smoking?

8 And I want to talk to you about Dr. Pierce's
9 study, because all the criticism and detail that we have
10 gone into with respect to Dr. Pierce in this case, it
11 boils down to one thing.

12 Dr. Pierce had a group of kids age 12 to 17, he
13 talked to them in 1993, and he talked to them again in
14 1996 when they were age 15 to 20. He never once based his
15 study on asking those kids, okay, during the last three
16 years, why did you start smoking, if you did? He didn't
17 ask that question. He created something called
18 receptivity, which doesn't exist in the marketing
19 literature; and he created some variables; and he took
20 some information. And then he came to the startling
21 conclusion that one-third of all smoking is caused by
22 advertising.

23 That's an unprecedented conclusion, by somebody
24 who's not a marketing expert. And although plaintiffs in
25 their cross examination of Lucy Henke tried to suggest
4694

1 that Dr. Pierces was a medical doctor, he's not a medical
2 doctor, he's an epidemiologist, which means that he is an
3 expert in statistics. But he is an expert in statistics

4 dealing with medical issues not consumer behavior or
5 advertising or the effects of advertising on people's
6 decision-making? He constructed a study that doesn't have
7 validity in the marketing context.

8 I want to show you just one slide with respect
9 to Dr. Pierce's study.

10 According to Dr. Pierce, if in 1993 you told
11 him that you definitely wouldn't smoke, and three years
12 later you still haven't smoked, but now you tell him you
13 probably aren't going to smoke in the future, he counts
14 you as on the way to be to being a smoker.

15 That's if you look at the details of his study.
16 The study is designed to exaggerate the impact of
17 advertising. In fact, it's designed to assume that every
18 change in attitude or behavior is based only on
19 advertising. That's why he comes to the conclusions that
20 he does.

21 According to Dr. Pierce, if you smoke one puff
22 of a cigarette in the three year space between the time
23 you were interviewed in '93 and when he got you in '96,
24 regardless of when it was, he counted you as a smoker, as
25 an experimenter on your way to being a smoker.

4695

1 Dr. Pierce's study, ladies and gentlemen, has
2 no validity. It defies common sense.

3 But Dr. Pierce's analysis that he offered in
4 other areas also defies common sense, because Dr. Pierce
5 constructs a world in which he thinks advertising is the
6 key motivator for everything that happens.

7 You remember his testimony about Virginia
8 Slims, and we have heard about this in this case from a
9 couple of witnesses, Dr. Harris and Dr. Pierce, the notion
10 that women started smoking at greater rates in the mid-60s
11 solely because there was a product called Virginia Slims
12 that started advertising.

13 Pierce and Harris completely ignore the social
14 phenomenon that is going on in the 60s with respect to
15 women. Completely take it out of the equation. The fact
16 is that smoking rates for women started going up in 1964.
17 That's right about the time that Betty Friedan writes her
18 book and the National Organization of Women is starting to
19 get active and the entire women's liberation movement, as
20 it was called then, begins to pick up momentum.

21 Virginia Slims was not launched as a brand in
22 this company until 1967, three years after the uptake in
23 smoking. Pierce and Harris don't pay attention to that,
24 they look at graphs and they say, any change in
25 consumption pattern is due to advertising. They assume it

4696

1 without being able to show it.

2 One other thing that Dr. Pierce told you. He
3 talked to you about the uptake in smoking that he says
4 began in 1985 or 1986, and he drew that graph for you.
5 And he said this corresponds to when the Joe Camel
6 campaign came out, and it shows how under age kids began
7 initiating smoking in the mid-1980s, and it's due to Joe
8 Camel.

9 I want to show you the data behind that. This
10 is the data that Dr. Pierce was working off of. This is
11 first use among 12 to 17 year olds. In 1985 the rate was
12 111.3; in 1992 it was 115. Joe Camel was launched in
13 1988. There was no uptake as a result of the Joe Camel
14 campaign.

15 Dr. Pierce drew a graph that ignored the actual
16 data points that was projected for those years. The
17 uptake is observed starting in 1993 and 1994, five years
18 after Joe Camel has been in existence. It wasn't Joe
19 Camel, ladies and gentlemen. The graph was inaccurate.

20 But there is more than that. Let's go to the
21 second point. Did we target kids? Because there is a
22 complete disconnection between the proof that the
23 plaintiffs thinks or claims that they have presented and
24 what's actually been presented.

25 They have shown you sporadic documents over a
4697

1 20 or 30 year period that show somebody in some company at
2 some point was making reference to somebody under the age
3 of 18. There are no documents creating a strategy, no
4 documents laying out a media plan, no documents showing
5 you a focus group survey that dealt with kids under the
6 age of 18 to test advertising or to test the reaction
7 against advertising.

8 Lucy Henke was in here. She told you what she
9 did when she worked for M&M Mars. When they were
10 designing a candy bar campaign for kids they actually took
11 14 and 15 year olds, surveyed them before an advertising
12 campaign, launched the campaign, surveyed them after the
13 campaign, did focus groups: What's your response to this
14 advertising?

15 It is a complicated process. You haven't seen
16 document one in this case where any of these companies sat
17 down with 15 year olds and 16 year olds and said: How do
18 you feel about this advertising?

19 In fact, Lynn Beasley, who designed the Joe
20 Camel campaign, came into this courtroom and told you that
21 when she was trying to replace that Bob Beck campaign --
22 remember poor Bob? He wasn't doing a good job for
23 Camel -- she did focus groups of 18 to 24 year olds and 25
24 to 34 year olds. She called them competitive smokers.
25 That means Marlboro smokers, Viceroy smokers, somebody
4698

1 who's not smoking Camel.

2 And she did focus groups on 18 to 50 year old
3 franchise smokers, people who smoke Camel. Making sure
4 that anybody who ran an ad campaign didn't offend the
5 people who were using the brand.

6 And she at the time tested market groups from
7 12 to 14 and 25 to 34.

8 And she said in talking to these focus groups,
9 it was my idea to show them some of these Joe Camel
10 executions. She said as we began doing that these folks
11 liked the execution. She was using focus groups of adult,
12 lawful smokers. That was her testimony.

13 And you know what? She wasn't cross examined
14 on it. There is not a single document to contradict it.
15 It stands as the uncontroverted testimony and evidence in
16 this case as to how Reynolds launched Joe Camel.

17 Let me talk to you about the documents that
18 pertain with respect to Marlboro and to Philip Morris. We
19 keep hearing about Myron Johnston.

20 You look at Myron Johnston's documents and I
21 can tell you, I like Myron Johnston's documents better
22 than these guys do because they prove that Philip Morris
23 wasn't collecting data on underage smokers. And let me
24 just show you one.

25 This is Myron Johnston's document from March,

1 1981. In March, 1981 Myron Johnston is writing one of
2 these documents. He's just come up with some new public
3 information, he's sending it.

4 And he says, "until very recently there have
5 been no good data on teenage cigarette smoking for the
6 years after 1974. For seven years, Philip Morris hadn't
7 had any good data on teenage smoking." That's Myron
8 Johnston. "There is no monitoring, there is no focus
9 group work, there is no reaction to ads, there is not even
10 any demographic work. We have had no good data since from
11 1974.

12 "I have recently come upon two excellent
13 sources of data on cigarette smoking. The most useful
14 data are from the Survey Research Center at the University
15 of Michigan, a public source. These companies weren't
16 targeting, crafting, strategizing, doing the focus group
17 work they needed to do. There was no targeting and there
18 has been absolutely no evidence in this case that that
19 happened. Not a single document.

20 In fact, when Jim Morgan was here he laid down
21 the gauntlet, he said there were 250,000 documents that
22 have been produced in this litigation, and I'm looking for
23 a plan for Marlboro, or something that gets put in front
24 of me that shows me that my company sat down and
25 strategized how do we reach the 14 and 15 year olds? How

4700

1 do we get to the underage smoker?

2 He was cross examined here, not a single
3 document produced in cross examination, not a single
4 document shown to you today in the closing argument.

5 There is more. Take a look at the ads. Boy,
6 you know what? We keep looking at these internal
7 documents as though what people are writing internally is
8 what's going on in the real world.

9 What ads were being run by these companies? We
10 see documents from Reynolds in the 1970s that talk about
11 underage smoking and 14 to 17 year olds. And this is very
12 concerning to the plaintiffs what ads were Reynolds
13 running in the 1970's? And we saw examples of this.

14 Here is the 1974 to 1979 ad campaign for
15 Winston. Remember, Winston is fighting for market share
16 with Marlboro. Marlboro is overtaking Winston in the 70s.
17 Actually, from my clients perspective we are killing
18 Winston in the 70s. This is what Reynolds comes up with
19 from '74 to '79.

20 Remember when Dr. Arnett told you the guy in
21 the middle up there in the front row, he was the youth
22 targeting guy. He said that's the one, the one in the
23 middle, the top row, that's the one that appeals to youth.

24 This is absurd, this is not targeting youth,
25 this is targeting adult smokers. These are Reynolds ads

4701

1 that were run in the fall of 1980. These are the Kool
2 executions that were being run in the 70s.

3 You saw some Kool marketing documents from 1975
4 this morning. This is the youth appeal that Kool was
5 using in the 1970's.

6 Complete failure of proof, ladies and
7 gentlemen.

8 And who do the plaintiffs bring in as their
9 experts? Did they bring in an marketing expert? And the
10 answer is no. They brought in an epidemiologist. They

11 brought in a medical doctor, Dr. Davis, whose training is
12 in medicine, who believes that advertising should be
13 banned, who came in here and told you that the companies
14 don't protect their logo.

15 You remember, he brought in that squirt gun
16 that got me all excited because he pulled it out on the
17 witness stand. He didn't tell you, for instance, that
18 these companies sue people who use their logo and
19 trademark; that they have people whose sole job it is to
20 bring lawsuits and enforce the trademark if the company
21 doesn't protect its trademark. It can lose it.

22 He didn't tell you any of that.

23 Who else did they bring in to tell you about
24 advertising? They brought in Dr. Arnett. Arnett, who is
25 a psychologist, not a marketing person. None of the

4702

1 witnesses that they brought in actually have ever devised
2 an advertising or marketing program, presided over one,
3 executed one. These are not people who are involved in
4 marketing.

5 And Dr. Arnett, remember Dr. Arnett? His
6 testimony was based on documents that the plaintiffs had
7 given him on cross examination. Do you remember that he
8 didn't want to answer questions about documents unless he
9 had the highlighted version that he had prepared before he
10 testified? Remember he kept saying, Mr. Weber, I'm
11 looking for the highlighted version.

12 Dr. Arnett doesn't know what happened in this
13 industry. The people that we called know what happened in
14 this industry, Morgan and Beasley, and they were here and
15 they testified, and they looked you in the eye, and they
16 told you what happened when they were at the company.

17 Morgan stepped up to the problems at Philip
18 Morris when he thought there was a failure in judgment.
19 He didn't run away from it.

20 Beasley told you how they developed Joe Camel.
21 These are not the evil kabal that's out there scheming to
22 get 12 year olds out to smoke, ladies and gentlemen.

23 What about Lucy Henke? We brought Lucy Henke
24 in for two reasons. First to tell you about the body of
25 academic literature that says advertising doesn't cause

4703

1 smoking; and second to give you a perspective. I think a
2 more respective, if you will, perspective of how kids
3 respond to advertising Lucy Henke told you her work showed
4 kids aren't able to process advertising, they don't see
5 pictures and just go out and smoke. That's not what her
6 work shows.

7 And I thought her cross examination was a
8 little unfair when plaintiffs suggested that because later
9 in her career, after she had published her work the
10 tobacco companies contacted her and hired her as a
11 consultant, that she had somehow been bought and paid for
12 and that she was here lying because on occasion she's
13 hired as a tobacco consultant. I thought that was unfair,
14 particularly since her original work in 1978 before she
15 did her doctorate on non-verbal communication with kids,
16 she told you that she changed her views from '78 to 1980.
17 And I think it was presented here as though she changed
18 her views when she got a check from the tobacco companies.
19 And that's not the evidence and I thought that was unfair.

20 Bottom line ladies and gentlemen, they haven't
21 made out a case, not under the law, not under the facts.

22 I want to spend the remaining time that I've
23 got which is seven minutes on Philip Morris. Maybe I have
24 eight, if Mr. Weber is in a good mood. If he thinks I'm
25 doing a good job.

4704

1 Let me tell you about Philip Morris.
2 First of all, I want to talk to you about this
3 company. For forty years Philip Morris has contributed to
4 improve it's product. Responding to the health community
5 in making a safer product. One of the things you saw that
6 Mr. Carchman introduced to you is accord. Accord is a
7 technological phenomenal product, it involves 40 patents,
8 aluminum alloy, microchips, things that looks like you are
9 smoking a beeper. It represents the -- that's funny, but
10 it represents the culmination of work.

11 When these plaintiffs say there couldn't have
12 been a safer product developed. I say take a look at that
13 Accord and tell me how that product could have been
14 developed in 1961 or in 1970, or 1980? That is a product
15 that only could have been developed in today's
16 technologically advanced world.

17 We had to, Philip Morris had to invent haven't
18 an alloy to heat the cigarette. And the story of the
19 development of the Accord and the story of other things
20 that Philip Morris has done in terms of ventilation and
21 laser technology and dry ice expanded tobacco, all of
22 those steps are a company committed to a safer product.

23 Know who else says that? William Farone. The
24 man who came here to dump on the company, even Farone
25 indicated he was hired by Philip Morris to work on a safer

4705

1 cigarette that he spent eight years doing that he had 200
2 people working under him. He's proud of the work he did
3 and he thinks he made a lot of progress while he was
4 there. That's all his testimony, even Farone has to admit
5 this is a company that has been responsive to trying to
6 make their product safer.

7 I want to talk a little bit about nicotine,
8 because we heard about the nicotine, Mr. Coughlin waved
9 that book, so I do have the book.

10 All right, William Dunn wrote the memo and they
11 say it's a big secret. And you will never see anything in
12 this book that says anything like what he says in his
13 memo. So when this goes back with you in evidence, on
14 page 5, if you open the book you will see a common
15 postulate. It is the peculiar pharmacology of each of
16 these compounds that reinforces smoking behavior. Goes on
17 to say, apparently there is an optimal dose for nicotine,
18 for too little or too much is rejected by tobacco smokers.

19 You will see on page 5 and page 6, ideas that
20 exactly mirror what's in that William Dunn document. No
21 secrets.

22 And let me tell you about William Dunn.
23 William Dunn and Philip Morris studied nicotine because
24 they should, because they need to know about their
25 product. And within Philip Morris the study of nicotine

4706

1 was an appropriate thing to be doing. It wasn't squashed
2 or suppressed.

3 Let me tell you about something else. Dunn's
4 work lead Philip Morris in the 1980s to do what? Develop
5 the first commercially marketed denicotinized cigarette.
6 Philip Morris is the company that spent 300 million

7 dollars figuring out a way to take nicotine out of tobacco
8 built a factory capable of producing 20 million pounds of
9 denicotinized tobacco a year and marketed Next, their
10 denicotinized cigarette, test marketed even in Toledo.

11 It failed eventually but this is not a company
12 that believes that nicotine is essential for a commercial
13 success. They tried to market a denicotinized cigarette.
14 They didn't get it right, maybe in the future they will.

15 Let me talk about William Farone briefly. And
16 let me just say these three Latin words. Alea Jacta est.
17 You know what? He joked about what Farone said on the day
18 he was fired. He said Alea Jacta est, meanings the die is
19 cast.

20 That wasn't a friendly statement that Farone
21 made on the day he was fired, that was a statement that
22 Julius Cesar said before he sacked one of his enemies. It
23 is a declaration of war. And when William Farone came in
24 here to testify ladies and gentlemen, he holds a grudge
25 against Philip Morris and he tried to dirty up Philip

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1 Morris.

2 He told you about things that didn't pan out;
3 code words, biological activity. I'm not going to spend
4 time on it, it's not a code word used by everybody,
5 including the naturally occurring denitrification. The
6 process Harold Burnley testified about, it is not an issue
7 not commercially feasible, despite what he had to say.

8 He said, we didn't test ingredients. Richard
9 Carchman in here and gave you testimony about the
10 ingredient protocol for testing, everything is tested
11 independent panels have reviewed our testing, and the
12 Office of Smoking and Health has reviewed our testing for
13 safety.

14 He told you about, he told you about document
15 destruction. And I want to spend a little time on that.

16 Farone tried to tell you that Osdene -- and I'm
17 going to talk about Osdene is the last thing I want to
18 talk to you about. Farone told you Osdene destroyed
19 documents which documents in beef to documents are Richard
20 Carchman was in here, one of his job was to work with
21 INBIFO for the years he was at Philip Morris. He told you
22 every lab report ever generated at INBIFO back to the 60s
23 is still at INBIFO, intact.

24 He told you there are INBIFO documents at
25 Philip Morris, he has files of them going back to the 60s.

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1 He told you that in his litigation, all INBIFO documents
2 have been made available. There is not a single missing
3 INBIFO document that has been proven in this case and
4 Carchman wasn't even cross examined on it, INBIFO, because
5 it gets certified by the FDA. It's been certified as
6 having generally good laboratory practices GLP.

7 You heard Carchman talk about that INBIFO has
8 all of its records intact, period, end of the story. And
9 they have been made available to plaintiffs in litigation.
10 And that testimony went unchallenged.

11 So whatever Farone was talking about with
12 respect to Osdene, there is no proof in this case that a
13 single document is missing or has been destroyed, no
14 evidence of what document that would be or what it is that
15 INBIFO would have been doing that would have required
16 anybody to destroy it. No evidence whatsoever.

17 Let me talk about Osdene.

18 I talked about him before in opening statement,
19 I want to talk to him about him now. He took the Fifth
20 Amendment. You saw that tape, he took the Fifth Amendment
21 at the direction of his lawyer. Philip Morris was not his
22 lawyers at that deposition. In fact, Philip Morris has
23 written letters to Osdene asking him to testify.

24 This is a letter from the CEO of Philip Morris.
25 We have repeatedly requested that you testify fully and

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1 truthfully at your depositions in civil cases, and that
2 you not invoke your Fifth Amendment rights. I want to
3 repeat and personally underscore that request.

4 We wanted Osdene to testify.

5 Now the court has told you that you have the
6 right as the jury, and you do, to draw a negative
7 inference from what Osdene had to say or not say, as it
8 turns out. But in this case we don't know why Osdene was
9 taking the Fifth Amendment. What we know is that Philip
10 Morris wanted him to testify.

11 In fact, if you take a look at some of his
12 testimony, you will see how unfair it would be to take a
13 negative inference.

14 Let me ask you this, Dr. Osdene, did Philip
15 Morris manufacture cigarettes while you were employed at
16 Philip Morris?

17 Same response, meaning he takes the Fifth
18 Amendment.

19 Did Philip Morris manufacture the Marlboro
20 brand of cigarettes while you were employed at Philip
21 Morris?

22 Same response.

23 I don't think you can take any comfort in one
24 way or the other of classifying Osdene.

25 I see the hook coming out from Mr. Weber so I'm
4710

1 really done.

2 Philip Morris called Richard Carchman, Harold
3 Burnley, and Jim Morgan. In a way, three very different
4 people. Three different persons but in another way very
5 much alike. They were intelligent, they were dedicated,
6 they were direct in their testimony. They had
7 credibility. They answered questions.

8 They were here to tell the story about what
9 they knew about how we manufacture cigarettes, how we
10 research and develop cigarettes, and how we market
11 cigarettes. I would have liked to have called more
12 witnesses but we had a short trial, and I hope you will,
13 in judging Philip Morris, judge them as well. They
14 represent this company here, and they should be the symbol
15 of the company as you go back and deliberate.

16 Ladies and gentlemen, there is no wizard behind
17 the curtain, there is no secret kabul manipulating these
18 gentleman. There was the testimony or suggestion that
19 Harold Burnley didn't know why it was he was adding
20 ammonia in the process.

21 You remember, Mr. Coughlin said there are tens
22 of thousands of good people who work for tobacco
23 companies. Harold Burnley is one of them, and maybe he
24 just doesn't understand why he's adding ammonia to the
25 product as though there is some sort of secret kabul

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1 manipulating people. There is no wizard behind this
2 curtain. The people you saw are the people who run this

3 company. Honest, directed, committed, the people you want
4 running the company.

5 It's not an easy job they do, their business.
6 Well, speaking of not an easy job, you don't
7 have an easy job either. In a few hours this case will be
8 in your hands. You have paid remarkable attention to the
9 evidence in this case. I know you are going to decide
10 this case in accordance with the judge's instructions, in
11 accordance with the law, and in accordance with the
12 evidence that has been introduced. That's all anybody can
13 ask.

14 I thank you for the attention you paid and I
15 thank you for listening to me now.

16 Thank you.

17 THE COURT: Mr. Weber.

18 Let me just ask kind of a yes or no. Do you
19 wish a break now?

20 Okay. Five minutes is all we are going to
21 take. So don't talk about the case until it is submitted.

22 Five minutes, no more.

23 - - -

24 (Brief recess.)

25

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1 THE COURT: You may continue.

2 MR. WEBER: Thank you, Your Honor. Good
3 afternoon, Ladies and Gentlemen. As I said some three weeks
4 ago, it is again a pleasure to be in front of you on behalf
5 of the R.J. Reynolds Tobacco Company and the several
6 thousand men and women who do the company's work.

7 This case has moved quickly, as I'm sure you know. I'm
8 sure you have noticed from time to time some of the lawyers
9 may have red eyes from staying up a little late. We're in
10 the home stretch. And it is a particular pleasure to speak
11 with you on the eve of St. Patrick's Day.

12 Before I go on I want to offer one quick observation
13 that I know everyone here shares, and that is we do
14 appreciate the wonderful attention and cooperation and
15 patience you've given us, your generosity in laughing at our
16 jokes, your commitment to your duties; sunshine, snowstorms,
17 sickness, health, you've been here.

18 We thank you, and we're almost done, which I'm sure is
19 good news for you.

20 My discussion with you today is going to cover three
21 basic topics. First, I want to talk about plaintiffs'
22 theories about conspiracy, what it is they've said and what
23 it is they've proved. Secondly, I want to talk about some
24 of the specific claims that have been made against my
25 client, the R.J. Reynolds Tobacco Company, including the

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1 claims about Joe Camel, and I want to ask you to consider
2 whether plaintiffs have been fair to you, the jury, in how
3 they characterize those issues.

4 And finally, and most importantly, I want to address
5 the one issue really on which this entire case turns: The
6 claim that wrongful conduct actually caused more
7 beneficiaries to smoke and caused fewer of them to quit, a
8 claim that presents to you front and center the decisions of
9 real live working people, the personal decisions they have
10 made on whether to smoke and on whether to quit. Real
11 decisions by real people running their own lives, their
12 awareness, their attention to the warnings that have been on
13 the packs for 30 some years, what they relied on and what

14 they didn't.
15 And in the course of that discussion, I'm going to
16 remind you of one inescapable fact that dominates these
17 proceedings, and that is that there is a gap, an unbridgable
18 unfathomable gap between the allegations of wrongful conduct
19 and the decisions of these Ohio working men and women and
20 the funds.

21 Let me turn now and spend a few minutes on these
22 conspiracy theories. You know, the fundamental flaw, I
23 think, of conspiracy theories, like the ones that plaintiffs
24 put in front of you, is they inevitably explain too much.
25 They simplify to an unnatural and unrealistic degree the far

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1 more complex and textured world of real life and reality.

2 And it is, of course, the very simplicity of a
3 conspiracy theory that makes it so seductive, so
4 attractive. That's why there are conspiracy theories about
5 any complex issue in this society. If you have a complex
6 issue you don't have to wait very long until some simple
7 conspiracy theory comes along that purports to explain
8 everything.

9 But I think common sense tells us to mistrust these
10 kinds of theories, and that's just what happened here. I
11 think our common sense spoke to us right from the beginning,
12 and it started with the cross of Dr. Jaffe, when the
13 conspiracy theories that he discussed were revealed to be
14 Akron's version of the Emperor's New Clothes: Wonderful to
15 look at, as long as you didn't start examining the
16 substance.

17 Just a few examples. Dr. Jaffe told you this was a
18 conspiracy limited to companies in the United States, and he
19 said that that was the case because a global conspiracy made
20 no sense in fact or in economic theory.

21 That was his testimony. That's how they start their
22 case. At the end of their case they brought in Dr. Harris,
23 and he was far more aggressive on this. He testified there
24 may well be an international conspiracy. In his world,
25 German tobacco companies, the French government-owned

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1 tobacco company may well be coconspirators. He was
2 unwilling to rule out any tobacco company as potentially
3 being in a conspiracy.

4 I had the feeling he was so aggressive in that
5 testimony that if I had kept him on that stand a little
6 longer he would have been telling you there was an
7 intergalactic tobacco conspiracy.

8 But when you consider this issue as you deliberate, I
9 ask you to consider the stark contrast between the witnesses
10 offered by plaintiffs on that score and the witness called
11 by the defendants. Professor Jaffe and Dr. Harris were
12 theorists, looked at excerpts from selected documents given
13 to them by the lawyers.

14 We called Dr. Scheffman. Dr. Scheffman served as the
15 chief economist for the Federal Trade Commission, a position
16 in which he analyzed allegations of conspiracy for our
17 government. He applied a standard economic methodology. He
18 gave you a professional approach. He didn't concoct a
19 theory that when facts didn't fit he'd say, well, that was
20 just cheating on the conspiracy, ignore those facts.

21 He applied a standard methodology and he analyzed this
22 the way professionals do. He looked at the company
23 documents, he said that on direct, and in cross-examination
24 they only asked him about two documents, only two. They

25 didn't challenge any of his conclusions.

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1 He looked at real world economic evidence and history.
2 In short, Dr. Scheffman did it right. He told you that his
3 standard technique was a benchmark analysis to look at the
4 allegation of conspiracy in one market, then look at other
5 markets, see how it compared, see if it was different. If
6 there really were a conspiracy we ought to see a difference,
7 we ought to see effects.

8 He showed you data from a World Health Organization
9 report. Remember this? There was a chart for men and a
10 chart for women. This is prevalence of smoking. And
11 remember the allegation was the conspiracy in America caused
12 more people to start smoking, fewer to quit. But Dr.
13 Scheffman, he didn't just take the allegation, he looked at
14 data from the World Health Organization, and it showed that
15 prevalence in the United States wasn't on the high side, it
16 was on the exact opposite side that the conspiracy theory
17 would have predicted.

18 What else did he do? He look at the allegations that
19 somehow product innovation was delayed here in the United
20 States. Do you remember those?

21 And when he did, when he searched the literature, he
22 found out, and he told you, that the rest of the world
23 lagged 10 to 15 years behind these companies in what they
24 did and what they invented and how they lowered tar and
25 nicotine.

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1 These companies weren't holding innovation back, they
2 were the world leaders. No cross examination on that point.

3 He also explained the major alternative design
4 breakthroughs that have been invented anywhere in the world,
5 and it was these guys who invent them, no one else. The
6 alleged conspirators were bringing innovation to the table:
7 Facts that can't fit with the conspiracy theory.

8 And, of course, not even Professor Jaffe or Dr. Harris
9 dispute the fact that no one anywhere in the world has
10 produced a cigarette that is accepted, that is provably safe
11 or better than anything these companies have done.

12 Dr. Scheffman also looked at another real world piece
13 of evidence. He looked to see what competition was like in
14 the marketplace. This is a competitive marketplace, or
15 isn't it? Did he find competition? He sure did.

16 Again, that chart is a little hard to read with those
17 lines, but I'm sure you remember the point. This is not a
18 market and status quo, this is not a market where everyone
19 is getting along happily, surviving together. This is a
20 market where people are fighting. This is a market where
21 Liggett is basically out of business. This is a market
22 where American essentially went out of business. This is a
23 market where, unfortunately for my client R.J. Reynolds,
24 Philip Morris basically kicked everybody's tail.

25 Dr. Jaffe told you that if you look at other markets,
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1 soft drink, brewing, et cetera, you don't see changes like
2 this. You don't see the top go down to the bottom and
3 almost -- and in fact disappear. You don't see one of the
4 ones at the bottom go up to the top.

5 Competition, Ladies and Gentlemen. Real world facts,
6 not theories.

7 He also mentioned to you how these changes in market
8 share were actually driven by innovation. He showed you on
9 the one chart how American was so much slower in reacting to

10 what was being said and putting filter tips on the market,
11 and we saw what happened to Americans' market share.
12 He also addressed, and he's written about these issues
13 in the literature, he also addressed this issue of, well, if
14 only they'd spent more money. If only they spent more money
15 faster we'd have a perfectly safer cigarette now; you know,
16 the would-have, should-have, could-have type claim.
17 He looked at that, he said as an expert in innovation
18 you don't look at it that way. What you look at to see is
19 what's the output, what is being produced, what are the
20 innovations.
21 How do what these companies do on innovations compare
22 to what these alleged nonconspirators do? The fact of the
23 matter, these companies led the world, they set the
24 standard. They set the bar.
25 And if money could just solve problems, certainly the

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1 federal government would have solved the safer cigarette
2 problem years ago when it was in the National Cancer
3 Institute Tobacco Working Group effort. But it isn't just a
4 question of money, it's an issue of science, building block
5 by block, step by step, experiments being done, research
6 being done, on and on and on.

7 For example, all the research here in the R.J. Reynolds
8 monograph about the Premier cigarette, the whole chapter in
9 here on how this work couldn't have been done before, it was
10 new materials, new machines. That's how you analyze these
11 issue, not just with theories.

12 So what was plaintiffs' response to Dr. Scheffman? His
13 testimony was right on the money. What was the response?
14 Very, very brief cross-examination. Questions about what
15 the top cigarette brands were in Italy, I think, or Greece,
16 or something. Questions about only two documents, and that
17 was it.

18 And then even in the arguments, the plaintiffs' lawyer
19 said Dr. Scheffman's reference to these theories, those
20 aren't the theories in this case. And I'm sure you were as
21 surprised about that as I was, because those are the very
22 theories they have been talking about here for weeks on end.

23 So much, Ladies and Gentlemen, for the grand
24 conspiracies. What we have there, all there is are shifting
25 theories and still desperately seeking factual support that

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1 can't be found.

2 I now want to switch gears a little bit and talk about
3 a few issues that relate to my client specifically, R.J.
4 Reynolds.

5 You know from what we've done that we've split topics
6 up among ourselves, but there are a few issues I do need to
7 address on behalf of my client.

8 What's happened in this case is precisely what I
9 predicted to you in opening statement would happen. Some
10 few pieces of evidence taken out of context, fed to experts,
11 put in front of you, and the question, the question for you
12 is whether that's been fair.

13 I want to show you, use three examples of what
14 plaintiffs have put in front of you with respect to R.J.
15 Reynolds, and I want to ask you the question whether they
16 have treated you fairly on these issues.

17 For example -- if I could have the elmo, please -- this
18 document was put in front of you and represented to you as
19 something R.J. Reynolds ran and published to the public.

20 Mrs. Beasley came here and said, no, this was a draft,

21 a mock up. It never ran. It was never published.
22 Was that fair? That was Plaintiff's Exhibit 4305.
23 How about the document they put in front of several of
24 their witnesses, Plaintiff's Exhibit 3141. I'm sure you
25 remember this. How about this document from Camel. 1987.
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1 Camel saying -- remember, it had the 13 to 24-year-old
2 reference? And what happened when Mrs. Beasley came in and
3 got on the stand? She showed the documents right before,
4 she showed the documents right after. She showed a document
5 by the author of this very one the next day. All of those
6 documents show this was an 18 to 24-year-old product.
7 Dr. Townsend worked on that project, he testified about
8 the age bracket, as well.
9 Was it fair to you, was it giving you a fair picture to
10 put that document in front of you? 13 to 24, R.J. Reynolds
11 after kids. Was that fair? Only you can answer.
12 How about the Plaintiffs' Exhibit 1261? Plaintiffs'
13 Exhibit 1261. This was one that talked about the French
14 Camel ad, said it's as young as you can get. Remember, I
15 asked Mrs. Beasley about this? And remember, we went
16 through the numbers here, and we went, and we looked at the
17 document, which is AIW 3467, the whole document.
18 And remember on the front page here it says, Dana
19 Blackmar's comments are attached. Do you see that? And we
20 go and we continue, and there's Dana Blackmar's comments.
21 That's what plaintiff showed you, that one page. And
22 as we go through and we look at the ad, they're talking
23 about, remember this? Was this Joe Camel? Did this have
24 anything to do with Joe Camel or was this a French ad in
25 which a Camel, the beast as they call it, that appears on
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1 the pack, what was on a pair of jeans?
2 Is showing them one document in the middle without the
3 attachment that relates to it, is that fair to you? You
4 guys are being given the story. I can't go through
5 everything. I can't go through documents, drafts they put
6 in front of you without putting the finals in front of you.
7 We talk about some of that with the witnesses. I can't
8 go through the whole thing, but I do ask you, only you can
9 answer that question. And I ask you to judge plaintiffs on
10 that as you would judge me if I did something like that, if
11 I put evidence like that in front of you. Judge them the
12 same way.
13 Let me talk about Joe Camel for a minute. Mr. Lerman
14 dealt with some of it. I just want to talk about Mrs.
15 Beasley.
16 We brought her here. She was the one, it was her idea,
17 she executed it, she researched people only over 18 and
18 later only 21 and up, tested on 18 and over. She explained
19 how any ideas that the focus group said might appeal to
20 younger people were rejected. Remember the roller-blading,
21 the basketball executions, they didn't use those.
22 The initial memo on this for the birthday campaign,
23 remember, no punk hair-dos; remember how that came out of
24 the prior memo where there had been some punk hair-dos from
25 the French campaign, they said these might skew a little
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1 young. It was clear, no punk hair-do is no youthful
2 executions.
3 She also explained that campaign was a big success in
4 the 18 to 24 and 24 to 35 age group. R.J. Reynolds isn't
5 embarrassed about that. That was a good advertising

6 campaign to reach adult smokers.
7 Nothing says you can't have some humor in it, nothing
8 says you can't be a little irreverent, and that's exactly
9 what it was. It was a legal campaign to legal smokers, and
10 it was successful.
11 The real claim here is not whether some kids underage
12 started smoking Camel, because if some kids underage were
13 smoking maybe they would switch to Camel.
14 We didn't study that the government might have some
15 numbers, but that's not the issue. The issue is whether we
16 intentionally tried to get kids to start smoking. That's
17 the issue. And what was the proof on that? Mr. Lerman went
18 through it, I'm not going to go through it again, but the
19 proof was totally lacking. And it could not be better
20 exemplified than when Dr. Arnett admitted how he wrote that
21 article for the journal, Tobacco Control, and used the word
22 "cause" in it, but when it got published the word "cause"
23 was not there.
24 There was also some testimony about youth initiation
25 eventually increasing, and the facts in front of you are

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1 that the Joe Camel campaign started in early 1988, and that
2 some three plus years there seemed to be an uptake in youth
3 smoking initiation, at least according to some studies, not
4 all of them.
5 Now, is the fact that Joe Camel started three years
6 earlier, is that going to explain what happened three years
7 later? Was the Joe Camel campaign the only thing in the
8 universe? Is this another one of those situations where the
9 only thing the plaintiffs and their expert looked at are
10 tobacco reasons, tobacco fault, tobacco responsibility, and
11 they ignored the rest of the world?
12 Well, one of the jurors gave a question to Dr. Pierce
13 about what about all those other risky behaviors adolescents
14 were in, what was going on with that at the same time?
15 Dr. Pierce gave a straightforward answer. He said
16 those other risky behaviors were increasing. They weren't
17 advertised. Some of them weren't even legal. Some of them
18 were downright dangerous things. But those adolescent
19 trends were increasing, going up and down. That wasn't
20 because of Joe Camel. It wasn't because of cigarette
21 advertising. If anybody knew what it was because of, there
22 would be a heck of a lot better understanding of adolescents
23 and a heck of a lot fewer parents pulling their hair out, to
24 be quite frank.

25 Mrs. Beasley testified on 98, 99 percent of the

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1 cigarette market is for those 18 and over, and she said it
2 would be crazy to risk their ability to do that business to
3 try to go after people underage. It doesn't make economic
4 sense. She talked about how 75 percent of the adult market
5 is a market she doesn't have. R.J. Reynolds has only a
6 quarter. And while the overall size of the market continues
7 to shrink, there is still a lot of business there for R.J.
8 Reynolds.
9 She talked about how switching does occur, it does
10 matter. And how their own data, Reynolds' own data shows 42
11 some percent of people 18 to 24, 18 to 20, in that age
12 group, are going to switch over a period of years. That's
13 why Reynolds is advertising, that's what they're working
14 for.
15 We showed you the ads. I'm not going to go through it
16 again, Mr. Lerman did. 1980 memorandum to Mr. Long that

17 could be read, I grant you, let's advertise to 14 to 17 year
18 olds. The proof is in what they did, not in interpreting
19 some 20-year-old memo. What did they do? You saw the ads.
20 And I think everybody other than Dr. Arnett agreed about the
21 ads.

22 Mr. Coughlin showed you a memo that said they were
23 aging all the underage smokers into the Reynolds profile as
24 if they were 18.

25 Read that memo carefully. See if there is any way that
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1 it fairly gets that meaning. What it says is that in the
2 statistics they're keeping -- the 18-year-olds are going to
3 go in as continuing smokers if the survey showed they were
4 smokers before instead of new smokers.

5 It doesn't say anything about people underage, and it
6 doesn't permit that reading in any reasonable way, shape or
7 form.

8 Diane Burrows' documents, goodness, we've heard enough
9 about Diane Burrows, retired down there in Mussel Shoals,
10 Alabama, giving a deposition in her home.

11 Diane Burrows -- here is the document. I ask you --
12 this is 2692 -- I ask you, look through this document,
13 hundreds of references to what Diane Burrows is talking
14 about. 18 to 24, 18 to 34. Lots of age breaks. Hundreds
15 of references.

16 One in the back that Mr. Coughlin has showed you time
17 and again, that was a collection of data from a published
18 government report. What's the fair picture on this memo?
19 What's the fair picture on this memo? The one page or the
20 whole book?

21 Now, you heard from a number of Reynolds former
22 employees, Mrs. Burrows, others. They said Reynolds had a
23 policy, they said Reynolds executed the policy, they said
24 they lived by the policy. That is unrebutted on this
25 record.

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1 Dr. Townsend came here, another vice president, talked
2 to you about research and development, talked about
3 Reynolds' inventions, reconstituted sheet expanded tobacco.
4 It is leading work in identifying constituents and how
5 important that was for smoke modifications; how their work
6 was cited by the Surgeon General and others; how they
7 supported and worked with the government and NCI TWG program
8 until the government quit corroborating.

9 He talked about pH. I want to spend just a minute on
10 that for Reynolds. He talk about the pH of Reynolds'
11 cigarettes and said it hadn't changed over time, and he had
12 those memos that were shown to you, and he went through
13 this. There were momentary correlations, and people were
14 drawing conclusions, but if you looked at the data over
15 time, the correlations weren't there.

16 That's exactly what he said. The work was done. He
17 showed you that Reynolds' use of ammonia didn't increase
18 pH. And as Mr. Bernick said, on a broader picture, the pH
19 hasn't increased. That was one of Dr. Teague's memos
20 drawing that momentary conclusion.

21 He talk about Premier and Eclipse. They asked him very
22 few questions about Premier and Eclipse. They asked him a
23 lot of questions about Claude Teague.

24 I heard so much about Claude Teague in this case, I
25 started wondering if it was the Teague tobacco company, was
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1 Teague the only guy who worked there.

2 The fact of the matter is, I don't have time to go
3 through it all. I want to mention a couple of Dr. Teague's
4 memos. He wrote one they showed you called Thoughts
5 Regarding the Youth Market. It says draft at the top. They
6 rarely show that, but you'll notice it when you look at it,
7 and the first sentence says, I know we can't do this, I know
8 it's against policy, but here is a bunch of thoughts I have.

9 So he acknowledged it wasn't in the policy. He was in
10 the R&D department, and there is not a bit of evidence in
11 this case that anything ever happened with respect to that
12 memo. That is to say that any of those ideas were picked.

13 He had another one called The Crucial Role of
14 Nicotine. Mr. Coughlin played you pieces of that a little
15 bit earlier. Plaintiffs' lawyers get all excited about that
16 memo, but there was one person in this courtroom who didn't
17 get excited, Dr. Neal Benowitz. Remember when I asked Dr.
18 Benowitz a series of questions about that memo? I said, Dr.
19 Benowitz, are these ideas any different from what the
20 outside researchers were saying? No.

21 Were these ideas that Dr. Teague was expressing any
22 different from the types of recommendations the Surgeon
23 General was making? No.

24 Were these the kind of things they ought to be thinking
25 about? Yeah.

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1 Were they talking about research that ought to be
2 done? Yeah.

3 No secrets, no data. Nothing in that Dr. Teague
4 memorandum that wasn't reflective of a wider scientific
5 society at large.

6 I want to discuss one more allegation on R.J. Reynolds
7 briefly. There was a single vague reference almost in
8 passing by Professor Proctor, and I'll have more on him
9 later, about a document he said might have been destroyed by
10 RJR. I don't know if you remember that.

11 The document he was referring to was the 1953 Claude
12 Teague document, the survey that was actually here, that
13 Professor Proctor put in evidence.

14 So I wanted to mention this because they have these
15 allegations about tampering and obstruction. The only
16 reference that any one of their witnesses really made about
17 this is this one about Dr. Teague's memorandum, and
18 Professor Proctor wasn't even sure, and it was puzzling,
19 because he had the memorandum in his hand. And when I had
20 ask Professor Proctor some questions on cross-examination I
21 asked him what he knew what he'd been shown, what documents
22 he'd been given about the R.J. Reynolds R&D library
23 microfilming process. What did he know about what they kept
24 on microfilm and how they did it. Nothing.

25 And I commend to you two exhibits, ASP 34, ASP 35,

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1 talking about how R.J. Reynolds kept those R&D records on
2 microfilm.

3 That memo of Dr. Teague's, that '53 survey of cancer
4 research was referred to again today. Dr. Proctor said that
5 was so important it might have changed the course of history
6 if that had been put out.

7 If you look right in the title of that, it had its
8 first word was survey. What Dr. Teague did, he went and
9 looked at the library and looked up the sources as to what
10 was public and wrote about it and summarized it, because all
11 things were happening at that time. If you were in a
12 tobacco company and the scientific reports were coming in,

13 you needed to know what the outside literature was saying.
14 That's what he did.

15 Professor Proctor at one point even said it wasn't a
16 credible memorandum, it cited the Roffo work, and he said he
17 thought he had discovered the Roffo work until Mr. Bernick
18 asked him on cross-examination, wasn't that the very work
19 that was published or referred to in Reader's Digest?

20 So, so much for the Claude Teague memorandum.

21 I said in opening that we'd step right up to the fact
22 that some of the Reynolds documents don't seem to square
23 with company policy. Some of them seem downright dumb. But
24 I also said the issue for you is to look at the full
25 picture. Look at the full picture, make the judgment as to
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1 whether they've been fair to you. Remember the credibility
2 of the two Reynolds vice presidents we brought in here for
3 you, Dr. Townsend and Ms. Beasley, and make your judgment,
4 and it is your judgment alone.

5 I just offer you one last thought on this. The kind of
6 arguments plaintiffs make in this regard remind me a little
7 bit about how you make an argument that Paul Brown was a bad
8 football coach. You could do it. What you do is you only
9 look at the data on all the games he lost. When you get all
10 that in and put a really good argument together, look at all
11 the games he lost, dumb plays he called, et cetera, et
12 cetera, and if that was the only data you had, it would be
13 truthful, it would be a truthful argument, but the problem
14 is it wouldn't be fair. It would be totally out of
15 context. It would be cherry picking. It wouldn't be fair
16 to Paul Brown.

17 Ignore the fact he won state championships down the
18 road with the Massillon Tigers, national championship with
19 the Buckeyes, world championships with the Browns. That's
20 context. That's the importance of looking at the full
21 picture instead of just the mistakes or the exceptions here
22 and there.

23 Now, before I move on to that last subject of causation
24 and reliance, I want to talk, spend a few minutes on the
25 instructions. And just like plaintiffs' lawyers, I want to
4732

1 preface my discussion of this very clearly. There is only
2 one source of the law here, and those are the instructions
3 the Court gave you. And more than anything else, don't
4 think anything the lawyers say can change a word of that.

5 I just want to direct your attention to some of those
6 to think about when you get into the room, and, of course, I
7 can't read them all, so I have to shorthand them a little
8 bit; but obviously all I'm trying to do is refer you to
9 different instructions the Court has given you.

10 One point that I think is very important is the Court
11 said plaintiffs have to prove every essential element of
12 their claims by a preponderance of the evidence. Now, there
13 are some other claims that have a higher burden, clear and
14 convincing burden. Let me just focus on that.

15 Every element by a preponderance of the evidence, and
16 if they don't satisfy that for any one of those elements
17 that His Honor told you about, the claim fails, period.

18 And this is important, because if we as defendants had
19 put on no evidence, if when they finished we just stopped
20 and put on nothing, plaintiffs still had the burden of
21 proof. The issue is whether they carried that preponderance
22 of the evidence as His Honor has instructed you.

23 He also talked about using your common experience, your

24 reason and your common sense, and I emphasize that to you as
25 well. Bringing into the courtroom all of the experience and

4733

1 background from your lives, what you as Ohioans know is
2 common knowledge, what you as Ohioans know is common sense.
3 Very important for your deliberations.

4 On the fraud claims, yes, they have to show an intent
5 to defraud. And as the Court said, good faith is a complete
6 defense on the fraud claims.

7 I refer you back to the witnesses we had here. Mrs.
8 Beasley, Dr. Townsend, the others from the other companies.
9 Good faith is a complete defense.

10 Dr. Jaffe, plaintiffs' own witness, with respect to the
11 frank statement, Mr. Bernick showed you plaintiffs' own
12 witness said he can make no claim that the frank statement
13 wasn't issued in good faith. So that's not even at issue
14 here, so no fraud can rest on that. Plaintiffs' own
15 witness.

16 The Court also instructed that they must show that a
17 false or fraudulent statements relate to material facts, and
18 that those material facts were important to reasonable
19 individuals or reasonable trustees in making their
20 decisions.

21 Plaintiffs have not and cannot meet that burden. I'm
22 going to get into that in a minute.

23 He also talked about how either the beneficiaries or
24 the trustees have to show reliance, reliance in connection
25 with these causes of action.

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1 They are required to prove that smokers or trustees
2 relied not on warnings on packs, not on their own awareness
3 on their own choices, not what the doctors told them, not
4 what the professional advisers told them, et cetera, but
5 relied on what the tobacco companies said, and reasonably
6 relied on that.

7 They cannot prove that, and I will explain precisely
8 why in a few minutes. Indeed, I think a fundamental question
9 here is where is that evidence in this case. Where is that
10 evidence for reliance.

11 They also have to prove that causation, proximate
12 cause. It is a lawyer's term. What it means, causation,
13 whatever it is this wrongful conduct allegedly did was a
14 substantial part, had a substantial role. As His Honor
15 said, a cause without which the injury wouldn't have
16 occurred.

17 They can't do that. They can't show that these tobacco
18 companies were the cause for any of the things they complain
19 about. They can't show that smoking would have been
20 different in America, they can't show that quitting would
21 have been different in America. It just isn't here.

22 On these obstruction of evidence or obstruction of
23 justice, evidence tampering charges, they haven't shown
24 anything in this case, and won't, of an Ohio connection with
25 those allegations. They haven't shown anything in this case

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1 of actual intention to obstruct or tamper. They can't show
2 the specific intent on that. The proof isn't there. They
3 can't prove those predicate acts. Again, another
4 independent reason to stop the plaintiffs right there.

5 I want to turn now to causation and reliance, talk
6 about the facts on that, now that I've given it a little bit
7 of a legal background. And I want to ask the real question,
8 did anything these defendants say, did, didn't do, whatever,

9 did anything they did that was wrongful affect the real
10 world decisions of either the beneficiaries or the
11 trustees? Did it affect it? Did they rely on it to their
12 detriment? Did it play a substantial part? Was it a cause
13 without which damage wouldn't have happened? Did the funds
14 and members rely?

15 I'm not going to start out this discussion by insulting
16 your intelligence with some goofy connect the dots picture
17 in which I draw a pack of cigarettes and act like I've
18 proved something. I wouldn't do that to you.

19 What I am going to do is reason with you about the
20 evidence, about the law that the Judge has given you, and
21 about the facts on causation and the facts on reliance.

22 Now, given that these are all individual decisions by
23 real people, real Ohio working men and women, one would have
24 thought the plaintiffs would have brought those people in
25 here to testify to you, explain how they decided to live

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1 their lives, what they knew, what they thought, how they
2 made their decisions, what they relied on, but they didn't.

3 When it came to looking at decisions of real people,
4 plaintiffs took a pass repeatedly throughout this lawsuit.
5 Experts were their friends, not real Ohioans.

6 They didn't identify for you one single individual in
7 this lawsuit, not one union man or woman who saw, read or
8 heard the frank statement, who claimed to start smoking
9 because of anything these companies did, who claimed not to
10 have quit smoking because of anything these companies did,
11 who claimed not to have the common knowledge that the rest
12 of the community had, who claimed not to be aware of the
13 risk, who claimed not to have read the warnings, who said he
14 was tricked, deceived, lied to, relied on anything that
15 these companies did. Not one person.

16 You heard Mr. Rowe earlier today said the activities of
17 these companies drowned out everything else. Drowned out.
18 Well, you'd think he would have found one of those drowning
19 people to come in here and explain it to you, but they
20 didn't. They didn't even bother to take a survey or poll of
21 these people.

22 Plaintiffs' experts actually went so far, Ladies and
23 Gentlemen, went so far as to say it didn't even matter what
24 the facts were with respect to real people, it didn't
25 matter.

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1 I'm sure you remember this from Dr. Harris. "So let me
2 see if I understand you then. It would not -- it does not,
3 in fact, matter to your opinion on causation you expressed
4 on direct, it would not, in fact, affect your opinion if it
5 turned out that every member, every smoking member of these
6 funds started smoking at a poker game with friends by
7 borrowing a cigarette, and because he thought he might look
8 like Jean Paul Bel-" -- actually it's not -- that says Joan,
9 but it's Jean -- "Jean Paul Belmondo. That would not
10 affect your opinion, right?

11 "A. Yes. For example -- yes. It would not affect my
12 opinion."

13 This is a reflection of choices made by real people.
14 This doesn't show a respect for their individual autonomy
15 and the decisions they make. This is an I know better
16 attitude because I'm an expert.

17 So what did they do with these experts? Let's talk
18 about what these experts did on causation.

19 Dr. Harris was here, a long-time smoking

20 advocate -- antismoking advocate. He's got a right to do
21 that, but he did bring an agenda. Indeed, he brought more
22 activism and zealotry to this case than he did science.
23 He did claim to you defendants' conduct caused more
24 people to smoke, fewer to quit. That's what he said. He
25 gave no analysis, and he never tied it to these union
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1 members.
2 What else didn't he do? He did no analysis to compare
3 smoking rates here to the rest of the world, as did Dr.
4 Scheffman, to see is there any real difference rate wise.
5 He admitted there was no peer reviewed article anywhere
6 claiming that tobacco companies' statements caused people to
7 begin to smoke.

8 He admitted the existence, if you remember this, of all
9 those social and personal factors I went through with Arnett
10 and I went through with Dr. Harris, all those factors, he
11 admitted the existence of all those factors into why people
12 start, why they continue; social, peers, et cetera, et
13 cetera, access, all those issues. You remember them, I'm
14 sure. He said that they were all factors, but he said he
15 had done no study controlling for all those factors.

16 And Dr. Wecker, that was exactly what Dr. Wecker said.
17 Dr. Wecker said, if you really want them to look at the
18 causation question you need to control for the other
19 factors, because this is not a world, no matter how they try
20 to paint it, it is not a world in which there are two things
21 going on, everything controlled by tobacco companies and
22 nothing else. That's what they'd have you believe, that if
23 something happens it's the tobacco companies.

24 Well, it's easy to say, but it's a whole different
25 reason -- a whole different process to confront that with
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1 cold hard fact where you have to control for other
2 variables, and you can't just assume the result you want is
3 the result you're going to get.

4 Dr. Harris admitted he couldn't explain ethnic and
5 socioeconomic differences in smoking initiation rates, and
6 clearly those aren't related conduct, conduct by the
7 industry.

8 And he even had to admit advertising directed at women
9 actually followed their increase in smoking, it didn't
10 precede it, it met demand. It didn't create it.

11 He ignored Chapter 8 of the 1989 report, Surgeon
12 General report, and I commend that to you. In Chapter 8 of
13 the 1989 report the government specifically looked at
14 pro-smoking activities and antismoking activities. It's
15 discussed at page 649. There is a whole chapter on it.

16 Page 503, page 516, on and on. They looked at
17 pro-smoking activities, they called them, industry activity,
18 they look at antismoking activity.

19 They looked at effects on consumption, they could not
20 reach a conclusion that anything these companies did have an
21 effect on that.

22 Now, Dr. Harris, he worked on that report. He didn't
23 come in here and tell you that, he didn't disclose that to
24 you, those conclusions where they looked at industry conduct
25 and couldn't prove it.

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1 His opinion is what we call a net opinion. That means
2 there is nothing there. It is just stripped down to
3 everything, when it comes down to his academic say-so.
4 That's what his opinion rested on. No science, no

5 statistics, no data; his say-so and naked assertion, take it
6 or leave it.

7 Which gets me to Dr. Davis. He also came in and gave
8 the opinion on causation. He did I it after giving his pat
9 little lecture about how sandals ought to have Surgeon
10 General's warnings, so if you look at them in the sand it
11 doesn't just say Camel, but it has the warning on it. I'm
12 sure you remember that.

13 It showed the picture of the penguin, the staged
14 photograph.

15 Dr. Davis was also involved in the '89 Surgeon
16 General's report. He didn't talk about that with you, he
17 didn't disclose that to you. Instead, he gave you another
18 net opinion. "It's so because I say it's so, and I've been
19 in this business," and he has been in this business for a
20 long time. His entire career has been as health
21 administrator, Office of Smoking and Health, now up in
22 Michigan. We need health administrators, and I'm not
23 criticizing him for that, and I'm not criticizing him in the
24 least for being as strongly antismoking as he is, and he
25 is. You saw him get boiling there about that a couple times

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1 in his cross-examination.

2 He's got a right to feel strongly. But just as it's
3 his right to feel that way, it is your right as jurors to
4 reject that opinion because there isn't science to back it
5 up and because it comes from a strong deep-seated antipathy
6 toward this whole issue of smoking.

7 That leaves me then with Professor Proctor from Penn
8 State, the last witness they had -- the last of the three
9 who talked about causation.

10 And he was a historian, not a medical doctor, not an
11 economist, a historian. And he gave you the opinion that,
12 you know, this Surgeon General's report in 1964, that should
13 have come out ten years earlier; and if it had, the whole
14 history of this would have been different.

15 Plaintiffs even showed you that chart of Dr. Proctor's
16 a little bit earlier today. I don't have quite as nice a
17 version of it as they do. Let me put that up there while I
18 talk about it.

19 I'm sure you remember it. That's Dr. Proctor's
20 analysis. He said, well, you know, you just move that curve
21 over to the left there, move it over ten years. My judgment
22 is ten years earlier. I'm a historian. And that's it.
23 Look at how the world would change.

24 This is emblematic of the problems with plaintiffs'
25 case. This is another one of these issues in which only the

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1 conduct of tobacco companies is analyzed.

2 It is another trip to Never-Never Land where there is
3 nothing else happening in the world other than what tobacco
4 companies do and what experts think they should have done,
5 where everybody has either got black hats or white hats.

6 Now, I'm sure that you noticed that plaintiffs asked
7 Professor Proctor to give this opinion, move the curve.
8 Interesting point. They had two medical experts, Dr.
9 Harris, Dr. Davis, who were both involved in that 1989
10 report.

11 They were involved, they understood the Surgeon General
12 process, and they were medical doctors.

13 Did they ask people who understood the Surgeon General
14 process, who were involved and were medical doctors, to give
15 this opinion? Did they ask their economist to give this

16 opinion?
17 This appears -- this is actually a chart that was drawn
18 from parts of the Surgeon General report where they talk
19 about econometric analyses, statistical analyses, real live
20 science analyses, looking at these issues, trying to measure
21 different factors.
22 But they didn't ask an economist to give this opinion.
23 They didn't ask their medical experts, who understood the
24 Surgeon General's reports, to give this opinion, because
25 they knew the medical experts wouldn't give testimony like

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1 this come heck or high water.
2 They could only get this testimony from someone with
3 two vital qualifications. That is the testimony that it
4 should move ten years back, Surgeon General's report should
5 have come out earlier, and the witness to give that had to
6 have two qualifications: No experience with Surgeon
7 General's reports and no medical degree.
8 Those were the qualifications. He just moved the curve
9 to the left. You remember his testimony? He did no
10 statistical analysis, he did no econometric analysis. He
11 just sat there and said, well, let's move it over. That was
12 the testimony.
13 He was asked to do this precisely because he had none
14 of the learning or expertise necessary to do it. He was
15 giving this testimony, Ladies and Gentlemen, because he was
16 the one witness uniquely unqualified to do it.
17 Professor Proctor did, however, discuss astrology a
18 couple times in his testimony. I hope you remember, twice
19 he referred to oriental cosmology. And I'd like to get into
20 that, but we don't have time, so let's come from oriental
21 cosmology back down to earth.
22 Let's look at facts here, real life facts dealing with
23 real life people. Ohioans, working men and women who made
24 their decisions. Let's go through that in the time we have
25 left.

4744

1 What was the common knowledge in the community, the
2 community in which these working men and women came from?
3 What was there? What the Toms, Janes, Joes, Sallys, real
4 people, what did they think? What were they aware of?
5 It is hard to reconstruct history. We all know what we
6 know. We know what we were told. We know what we were
7 taught.
8 We brought in Jim Martin, leading historian, American
9 historian, grew up right here in Akron. He brought a
10 disciplined approach, a multitiered approach. He was
11 familiar with the Ohio sources, the Ohio schools, on and on.
12 And he talked about it. He didn't come here as some
13 hypocrite, as was implied, to say, well, everybody knows,
14 but nobody knows.
15 He came here to talk about one direct issue:
16 Awareness. What did the community -- when was the
17 community's awareness of these issues, and he made it real
18 clear. I am not a scientist, I am not telling what the
19 ultimate answer is, I'm not telling you what people's
20 opinions necessarily were; I'm telling you what they knew,
21 what you knew just by living in this community.
22 He talked about how people were taught about smoking
23 from early years in the century in the Ohio schools, how
24 they were tested on it, how it was in Ohio papers, how it
25 was in the union papers, how it was talked about in the

1 voluntary organizations, how it went from top to bottom here
2 in Ohio. Nobody started or continued smoking in Ohio
3 without this awareness.

4 And it was hardly surprising, given all of that, that
5 the opinion polls bore him out, they bore him out directly
6 on point.

7 And he talked about a number of them. This, again, I
8 know it's a little bit hard to read, but again, these were
9 those comparative awareness charts.

10 1954. All that is is, have you heard or read cigarette
11 smoking may cause cancer. Simple question. It doesn't
12 prove that cigarettes cause disease, don't. Simple
13 question: Have you heard or read. 1954, 90 percent.
14 That's basically three times in the same year the response
15 of people who knew who delivered the sermon on the mound.

16 Was that awareness, Ladies and Gentlemen? It sure is.

17 Was that all he showed you? No. He put in front of
18 you statements from Surgeon General Burney in 1957, saying
19 that people have the information. The news media has done
20 an incredible job of getting that out there.

21 Statements from Dr. Heller at the National Cancer
22 Institute: Excellent job covering these issues.

23 He showed you another one which to me seem a little
24 odd, where when they're beginning to consider warnings the
25 American Medical Association said we don't need them.

1 Everybody knows, warnings went on in 1966, 33 some years
2 ago. They've been there that whole time. Everybody who's
3 picked up a pack of cigarettes in this time has seen them.

4 He showed you a survey. It wasn't just adults, he
5 showed you a survey of 7th and 8th grade students in
6 Cincinnati, 1966, published in '67, Journal of School
7 Health. 98 percent.

8 You will see in the Surgeon General's reports, by the
9 way, that will go back with you that the Surgeon General
10 said it's unrealistic to ever get above 90 percent, just
11 can't happen.

12 98 percent, 7th and 8th graders, right here in Ohio.

13 Dr. Daniel Horn, we showed you this one, too, as well.
14 First head of what became the Office on Smoking and Health,
15 did one of the first big studies. Stand on a rooftop and
16 shout it's dangerous, and you wouldn't be telling anybody
17 anything they didn't already know. Dr. Daniel Horn.

18 So what happened as of '64? Well, there was a unique
19 effect. It was not just information as of '64 and
20 thereafter, the public health community, the government, the
21 voluntary organizations, they set about to change behavior,
22 to get people to smoke different kinds of cigarettes, or to
23 quit. And quit was the first choice.

24 And behavior did change. 50 million people quit
25 smoking since then. Smoking has become less and less a

1 practice that was expected and more and more of an
2 exception. Smokers became more and more marginalized over
3 the years bit by bit, made to feel uncomfortable about their
4 choice, until today it is tough for anybody, for somebody to
5 relax and enjoy a smoke.

6 Information about the health risks of smoking became so
7 pervasive that people actually believe that -- when you do a
8 scientific study -- the health risks of smoking to be higher
9 than they are. Remember Dr. Viscusi came in from Harvard
10 for us, and he did this analysis, cut it a number of

11 different ways. And plaintiffs asked some questions on
12 cross-examination about, well, you know, the lung cancer
13 surveys, they don't really tell you anything, it may be a
14 proxy for other issues, so I put up the total mortality
15 number.

16 People perceive more risk than the Surgeon General
17 reports there is risk.

18 Is this an information deficit, Ladies and Gentlemen?
19 Is this people who need more information about smoking to
20 make these decisions?

21 He talked about how these statistics were true of the
22 public generally, how they were true of smokers, how they
23 were true of union workers, and how they were true of
24 younger people that he surveyed.

25 What did Dr. Martin say on these issues in the end? He
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1 said the information that was out there was overwhelmingly
2 negative. He actually looked at a series of articles,
3 remember, the New York Times and Cleveland Plain Dealer, to
4 see how many articles on smoking included comments by the
5 industry.

6 What was it, 10, 11, 15 percent, somewhere in there?
7 The articles were overwhelmingly negative even when they
8 quote an industry statement.

9 He said there was no evidence that anything the
10 industry did affected the general state of awareness or
11 union awareness or medical community awareness.

12 Dr. Scheffman talked about how the industry's
13 information went through the media almost without
14 exception. And Dr. Martin's analysis of those articles is
15 the only one that's here, overwhelmingly negative.

16 Ladies and Gentlemen, on that point of causation and
17 reliance, you will be urged, I guarantee you, when Mr.
18 Coughlin gets up, we will hear more of this "only one
19 cause," you know, it is not necessarily the only cause.

20 I'm not belittling his argument. What I'm saying is
21 you have some tough decisions to make here. They can't
22 prove cause, they can't prove reliance. They can't prove
23 that anything these companies did was a cause without which
24 these injuries they allege wouldn't have occurred. They
25 can't meet those standards.

4749

1 But how about the funds themselves? Let's move away
2 from the individuals, let's talk about the funds.

3 Plaintiffs put up some testimony from Mr. Garfield, one
4 of the trustees here, just a little bit earlier. They
5 didn't show this one. I want to show you a question and
6 answer from Mr. Garfield: "Do you believe that if the
7 trustees of the fund over the past 30 years knew what they
8 know today about the health consequence of tobacco and the
9 actions of the industry that they would have taken actions
10 such that they would have reduced the medical costs that
11 they paid associated with tobacco? Do you believe that?"

12 "A. Number one, I can't speak for them, okay. I can
13 speak for me. And that's got two edges on that sword,
14 okay. And I can't speak for the other people, but I go back
15 to tell you what I've told you previously on one of these
16 long strips of paper" -- what he's talking about is the
17 court reporter's paper, I'm sure you've noticed it is long
18 strips -- "that it's every man and woman to themselves.
19 They do what they want to do when they want to do it, and I
20 am for the freedoms. And if the freedoms that I believe in
21 are going to cost a little bit more someplace down the line,

22 then you make provisions for it, and you don't go around
23 suing people."
24 That was Mr. Garfield. They showed you another part of
25 his testimony. Remember the chart Dr. Ghilarducci showed

4750

1 you? It speaks reams to the very point Mr. Garfield is
2 making. Again, I don't have as good of a copy of
3 plaintiffs' chart, but they showed you this earlier. This
4 was their chart. What could be more clear about absolute
5 lack of causation and reliance? What could be more clear?

6 This squares with the testimony. We read a few
7 depositions of trustees last Thursday afternoon when we
8 finished, and it's never fun to read depositions, but we put
9 additional depositions in the record that weren't read.
10 They're there for you to look at in the jury room.

11 I urge you to look at them, because they bear this out
12 exactly. It brings the focus back to the real people making
13 real decisions. They bear this out exactly.

14 The trustees were making their decisions and their
15 recommendations from their professional advisers. They
16 weren't making recommendations on anything they heard from
17 the tobacco companies. And there is no dispute on that in
18 this record.

19 Even Professor Proctor testified that reasonable
20 doctors concluded causation back in the '50s, so if they're
21 given this advice through that chain, obviously nothing the
22 tobacco companies says affects that.

23 You heard Mr. Clarson's testimony read to you last
24 week, not misled in any way. There is an unbridgable gap in
25 the end, unbridgable gap, between those two lines Mr.

4751

1 Bernick drew earlier between the alleged wrongful conduct
2 and the decisions of real live people and union trustees.
3 It doesn't get there. No bridge can be built.

4 So what do they do? They claim addiction, they say,
5 well, you know, this emphasis on decisions, that's really
6 improper. Addiction. Addiction changes the whole mix.

7 Now, let's look at what it is they're talking about.
8 Remember, we showed you the interrogatory that said
9 addiction, their definition is loss of control of drug use,
10 implying that if one wants to stop it's difficult to do so.

11 Well, absolute contradiction between loss of control
12 and difficult to stop if you want to. One says you've lost
13 control, one says it's difficult. To be difficult means you
14 have control. All of us do difficult things every day,
15 breaking habits, starting things, whatever.

16 What does the evidence show on this? Well, not even
17 plaintiffs' experts bought the loss of control argument.
18 You didn't hear any of them say people are powerless to make
19 these decisions. They didn't do it.

20 The evidence is that people quit smoking in droves,
21 more than a million a year, so many there are now more
22 former smokers in this country as there are smokers.

23 And some 95 percent of these did so as a matter of
24 personal choice. They didn't need pills, didn't need
25 patches, didn't need halfway houses, didn't need to be

4752

1 strapped on a gurney, no detox center.

2 They just made the decision. I'm not saying it wasn't
3 difficult, it might have been. It surely was for some, but
4 they did it.

5 Dr. Cloninger was here and testified. He was one of
6 the leading scientists who participated in this, the

7 Diagnostic and Statistical Manual. This is the Bible of the
8 American Psychiatric Association, the complete catalogue of
9 mental illness.

10 And I'll tell you, when you look through here, there is
11 some stuff that will make your hair stand on end.

12 But with respect to these issues, what did Dr.
13 Cloninger tell us about this? At the very beginning of this
14 it makes it clear that loss of control is not implied here,
15 right at the very beginning.

16 And Dr. Cloninger talked about how people make choices,
17 what kind of choices they make, and he was totally -- his
18 testimony was not cross-examined on that.

19 How about the second part, difficult to quit. Well, as
20 I said to you in opening statement, you get no argument on
21 that. We step up to that. It can be difficult to quit. No
22 secret, it's been around forever.

23 Dr. Martin even told you, from Columbus, Mark Twain, on
24 and on, Henry Ford, the fact it can be difficult to quit is
25 known, and it's no secret.

4753

1 So what's the squabble? What it really comes down to
2 in some ways is what's the best descriptive term for the
3 behavior? You know, we've got the 1964 Surgeon General's
4 definition, you know, habituation definition; we've got the
5 1988 Surgeon General's definition, the addiction definition;
6 we've got the DSM definition, which to this day isn't
7 addiction, it is dependence, to this day.

8 Are we going to squabble about those words? Is that a
9 worthwhile endeavor to analyze whether people can make
10 choices on this or not?

11 I'm sure you notice that both Dr. Benowitz and Dr.
12 Parran said when they talk to their patients and they're
13 dealing with a cigarette smoke issue do they call them
14 addicts? Huh-uh. When they're dealing with real people
15 they say, you have a problem with your smoking, you might be
16 dependent. They don't call them addicts. They don't call
17 it addiction.

18 Dr. Benowitz even admitted that addiction is a term
19 that he had said at one time he wouldn't use in front of a
20 jury because it was too loaded, too confusing.

21 Do you remember that? He also said -- this is most
22 important -- that reasonable people, reasonable people can
23 still disagree about whether or not to use the label of
24 addiction because it is confusing.

25 He said -- Mr. Bernick showed you in the end its not

4754

1 important what the label is, the issue is it's hard to quit,
2 and it sure can be.

3 But two aspects of that behavior are important for you
4 to think about. Dr. Benowitz told you that there is
5 nothing about smoking or nicotine that diminishes in the
6 least the ability of people to understand, to think about,
7 to hear, to read warnings, to make reasonable human
8 willpower decisions about what they want to do.

9 Dr. Rowell came here from Louisville, and he wanted to
10 talk to you about what does science say about is there a
11 difference between things like nicotine and caffeine and
12 these other drugs, these things we call hard drugs.

13 Remember Dr. Rowell? Did he show you there was a
14 difference? He sure did.

15 Remember those bar charts on what the different levels
16 of chemicals that were released with nicotine and caffeine
17 and with amphetamines and the other? Was that a difference

18 that made a difference? It sure was, although I'm not sure
19 we needed an expert.
20 Common sense tells you there is a difference between
21 people who smoke cigarettes and those who stick needles in
22 their arms, and you don't need experts and you don't need
23 lawyers to tell you there is a difference between getting in
24 a car and getting on an airplane with a drunk or a coke head
25 and getting on one with somebody who happens to be a smoker.
4755

1 Everybody agrees, smoking can be hard to quit.
2 Everybody agrees, people can do it. Dr. Benowitz agrees the
3 names of the behavior don't matter.

4 So there is nothing about this whole addiction issue
5 that changes the fundamental mix we've been talking about.

6 I want to go now to just a few last points. We won't
7 have a chance to speak to you again after plaintiffs' lawyer
8 does, and that's part of the rules in court. I'm not
9 complaining about it. They have the burden of proof. They
10 get to open, they get to close. But I'd ask you for one
11 indulgence as you hear what I'm sure will be a fine
12 presentation by Mr. Coughlin. Think about it critically,
13 and when you go back to the jury room, realize we haven't
14 had a chance to respond, and we won't. Think about whether
15 what you're getting is fair, complete. Think about what
16 questions we might ask, just to make sure it's objective.
17 It's critical that the evidence is examined.

18 I'd ask you to do that because we won't have a chance
19 to respond, and I'm sure he'll be responding to many things.

20 Just a very few last points, Ladies and Gentlemen.
21 Courtrooms are filled with symbols. One of the symbols --
22 we don't have one right in this courtroom, but one of the
23 symbols is that statue of justice, always blindfolded,
24 holding a scale. And the blindfold is what always strikes
25 me, because what that says is that when justice is doing its
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1 work, it's just weighing the evidence, and it's not looking
2 at the status or the appearance or the whatever of who the
3 litigants are.

4 All that matters is the weight of the evidence. No
5 preconceived notions: "I like certain kinds of people, not
6 others. I like certain kinds of companies, not others." Or
7 "I don't like companies," whatever.

8 Justice is blindfolded. All that matters is evidence.

9 And that's an important symbol for us and for this
10 case, where there are so many political issues, so many
11 things about smoking, where all of you had ideas, notions,
12 thoughts about smoking before you ever got that mailing from
13 the Court saying you might have to come on in and be jurors.

14 You know, another symbol is the way the jury box is set
15 up with that railing keeping you jurors separate from us.
16 That's because the winds of politics and popularity and
17 unpopularity, they don't affect you.

18 What the public or the media or people who haven't sat
19 here throughout this whole case, what they think doesn't
20 affect you. You're set apart from all of us, even the
21 Court. That's because you and you alone, out of all the
22 millions of people in Ohio, and there are hundreds of
23 millions in this country, you and you alone have been called
24 in through this random process and bound together by an oath
25 you took and told it is your job, yours alone, to define
4757

1 justice in this case, to define what it is; not
2 philosophers, not theorists, not advocates, not anything.

3 That's your job.
4 And what you're about to go into in defining justice
5 for this case in accordance with the law His Honor gives
6 you, what you're about to do is going to take the best each
7 of you has to offer. It's going to take patience, it's
8 going to take listening, it's going to take the time to
9 express your own viewpoints, stand by your own convictions,
10 and listen to what others have to say, and it's going to
11 take courage. It's going to take courage and convictions,
12 courage of thought.
13 I urge each of you, take your time looking at that
14 evidence. Think about that evidence. Ask those questions
15 about whether it was put fairly before you.
16 I thank you here at the end for all the fairness you've
17 shown us, for all the cooperation, all the attention, and
18 with full confidence in how you will do fine justice in this
19 case for all of us.
20 I thank you and ask that you find for the defendants in
21 each and every respect. Thank you very much.
22 Thank you, Your Honor.
23 THE COURT: Mr. Coughlin?
24 MR. COUGHLIN: There is an old trial trick that
25 good attorneys know, and Mr. Weber and these gentlemen here
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1 are some of the finest attorneys in the country. They're
2 the best, if not the -- they're not the best money can buy,
3 they're the best. They're the best. That's why they're
4 here. They are some of the best attorneys in this country.
5 And Mr. Weber got up here and said, well, were they
6 fair when they showed you this document or were they fair
7 when they showed you that? And what happened? What was he
8 trying to do?
9 When the facts are bad for you, you put the other
10 people on trial, and that's what he tried to do.
11 He did it fairly, I think he did it fairly, because you
12 know that's what his client has been trying to do for all
13 these years. His client has been saying, it's the smokers'
14 fault. Everybody knew, it's the smokers' fault, and you
15 heard it in here today.
16 How can it be if it's the smokers' fault that the CEOs
17 go in and raise their hand? How can it be that they say
18 that they don't know? How can it be that they could still
19 have that defense?
20 And who are these people here? Who are my clients?
21 Are they not real people? You saw Gary Adams get up and
22 talk to you. Is he not a real person? Is he not a real
23 person in here in Ohio talking about how the trust funds
24 operate?
25 And Mike Murphy, I saw him get up and leave when I
4759
1 think he knew I was going to have to stand back up and talk.
2 Those are real people, you know? Those were real
3 people here that came in and talked to you about how the
4 funds operate.
5 And what do they want to do? They want to put somebody
6 else on trial.
7 It's a straw man. They want to put somebody else on
8 trial. They want to put the smoker on trial. Why? Because
9 these health funds suffered real damage here.
10 Mr. Weber pulled up a document and said, was that fair
11 to Mrs. Beasley? You heard Mrs. Beasley when I asked her
12 about that document. I put the document on the screen and
13 asked her about that, "Was that a Joe Camel document." I

14 had sent that document to her the night before. She'd
15 looked at it the night before. Once she told me on direct
16 it was not, we moved on.
17 It almost screwed up his whole comeback at the end to
18 try to accuse me of somehow misleading her, because they
19 knew we had gotten that document as one page like that.
20 That was the end of that question. That was the end of
21 that question.
22 You know, as to her with that document, that had
23 nothing to do with anything. It was a smoke screen, because
24 the facts here are hard to get away from.
25 They can't get away from these documents. They can't

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1 get away from them because these aren't just like a memo
2 that just happens to be generated. It is not an invoice.
3 These memos are directional memos from the top people in
4 these companies.
5 Mr. Long got up and said, well, you haven't seen much
6 from Lorillard, you've only seen -- he held up nine
7 documents.
8 Well, that's missing the whole point of this case.
9 This case is about these companies, come to be sure. No
10 doubt about it. But what it's really about is the
11 enterprise that they operated through. That's what the
12 problem is here. That's what created the problem.
13 All the statements that the TIRC and the CTR made and
14 the TI, and how it was interfaced with Hill & Knowlton, all
15 of those statements, they're their statements. They were on
16 the board of directors. They control those entities. And
17 they had to be legal entities to do what they needed to do
18 to protect themselves.
19 And they did some good work, no doubt about it. But it
20 operated as a fraud, as a fraud on these health funds,
21 because you're right, somebody had the ear of the medical
22 community, and it was the people working at the SAB.
23 Opinion polls: They keep coming in and talking about
24 how everybody knew in the opinion polls, and they showed
25 these opinion polls. Why do these companies, if that's

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1 true, why do they keep issuing those statements throughout
2 the years? All the statements about what it is and what
3 it's not. Why do they keep challenging and stepping out and
4 challenging the Surgeon General and others?
5 There's a reason. There's a reason these companies
6 spend nearly \$6 billion a year in advertising and promotion.
7 Why? Because they have to keep that debate open. It
8 not only affects the children, it also affects people that
9 are continuing to smoke and trying to quit.
10 And you heard from the stand the person who would know
11 the most, Dr. Parran. He testified that those mixed
12 messages that people received when they're addicted to
13 something are simply deadly. That's what the person who
14 takes care of these people -- that's what he testified to.
15 So it's time for somebody to take responsibility for
16 their own actions, that's right. And those people are the
17 tobacco industry defendants that are sitting here before
18 you. They made the choices, they made the choices to set up
19 these organizations to move forward, and so they should
20 answer those choices today in front of you and as you go
21 back to deliberate.
22 I want to go over this jury form with you for a second,
23 because it can be very confusing, but I want to answer a
24 couple more things that were brought up.

25 The defendants said that they brought in, defense
4762

1 counsel said they brought in people to explain the
2 documents. That's not true. The people that they brought
3 in did not explain those documents.

4 Mr. Morgan came in, and he essentially said, hey, he
5 saw those documents in litigation. That's what Lynn Beasley
6 said.

7 The people they brought in, Lynn Beasley didn't get on
8 that campaign, she said, until she started it back up right
9 before 1988.

10 Well, what happened in '85 and '86 and '87 when the
11 funny French Camel promotional items were going on here in
12 this country? Why did they keep trying to get away from
13 '85, '86, those numbers. They keep saying there must be
14 something wrong with Dr. Pierce's numbers.

15 Look at this jump in '85, '86 and '87. That's right,
16 there's a jump there, because that's when the Joe Camel
17 promotional gear came over here from France, the funny
18 French Camel, and it was a predecessor to the Joe Camel
19 campaign.

20 And that takes off in '88, and you get that, and what
21 happens in '88 to '92? There is a jump in the promotional
22 items. The Camel cash comes in, and you get another jump.

23 They can't get away from those facts of the rise in
24 teen smoking. But what do they do? They throw all these
25 ads up here about "Meet the Turk". You see, that didn't do
4763

1 anything, that didn't do anything. And he says the proof is
2 in the pudding. The proof is in the pudding.

3 You see, that didn't do anything, but he doesn't say
4 that about the Joe Camel campaign, because that's not what
5 happened with that campaign.

6 They looked at kids, they knew they need them to
7 survive and prosper, and they targeted them. They went
8 after them.

9 Philip Morris did the same thing. You saw documents in
10 every one of these defendants, what they were doing, and you
11 know what? They all knew what they were doing. The only
12 company that didn't seem to go after children the same way
13 was American. That's right.

14 You look through these documents, and there are very
15 few American documents that have that about the children and
16 what's going on with them.

17 And you know what? They were at the top. I believe
18 that it was Mr. Hahn who called everybody else together, no
19 doubt as they set up this thing to operate the TIRC that
20 they were involved in that, they were involved from the very
21 get-go, from the beginning of it. But you don't see many
22 children stats and what happens to that market share as it
23 comes down over the years. That's what happens to a brand
24 as market share rose.

25 Let me just touch on this verdict form for a minute.
4764

1 You're going to get to take this back with you, and I want
2 to explain to you, this first part asks about mail fraud,
3 and it goes through, and you've got to figure out whether
4 the defendants engaged in a scheme as to every one of these
5 companies here, and you mark it down and you read the
6 instruction carefully.

7 And as everybody else said, if anything I said right
8 now differs from what the Court instructs you, I apologize,
9 and it's what the Court instructs you obviously that

10 controls.

11 And you take a look at each of the defendants, and you
12 make a decision whether they engaged in a scheme, and we
13 submit that they did, Ladies and Gentlemen. We submit that
14 by participating with TIRC and CTR through TI that they
15 control the statements these people issued. Okay?

16 So the mailings that occurred out of here, the
17 cigarette samples, the promotional items, the ads and the
18 letters that these companies sent throughout the years,
19 satisfied further mailings, and that's literally hundreds of
20 thousands.

21 The real decision is not whether there were mailings;
22 there were mailings: All these documents, all the ads,
23 everything else. The decision is, were these companies that
24 you have to make a decision to, were they involved in the
25 scheme.

4765

1 So Philip Morris, were they involved in the scheme.
2 R.J. Reynolds, were they involved in a scheme that operated
3 to defraud the health funds. And we'd submit that as to the
4 six named representative health funds that they were.

5 And as you go through you answer, yes or no, however
6 that you're going to do it back there, either a yes, the
7 foreman or foreperson, forewoman, will write down yes or no
8 throughout each one, it doesn't have to be unanimous. You
9 can find one company did not participate in a mail fraud or
10 one company did not participate in the wire fraud, or one
11 company you feel they weren't involved necessarily in the
12 obstruction of justice, the concealment, or that another
13 company wasn't involved with any tampering.

14 But I would submit to you, Ladies and Gentlemen, that
15 they all were, not only through their joint activities with
16 each other, but they all knew what was going on with each
17 other because of the TIRC and CTR, and the Hill & Knowlton
18 and the TI, the Tobacco Institute.

19 It's that common bond that draws all of them together
20 in something that they controlled through this enterprise.
21 And as a result of that control, it's not only their own
22 activities, it's not only where you have Osdene taking the
23 Fifth and that note about destroying documents, and Farrone
24 coming in and confirming that, or that telex that they're
25 trying to get away desperately that goes, you know, across

4766

1 the seas from BAT over to B&W; it's not only those things,
2 but it's also what this group here did. And you know what's
3 going on with the special projects and what was concealed.
4 And so the wire fraud is use of the phones.

5 Hundreds of press releases, you'll see them throughout
6 the documents, the press releases. They talked about
7 official proceedings. They talked about official
8 proceedings here in Ohio.

9 I would submit to you that there are, first of all, no
10 requirement that the proceeding be here in Ohio, that it has
11 to impact Ohio, that that's what the proceeding is all
12 about; that it can be the Surgeon General's, it can be the
13 FDA, it can be Congressional testimony. And you saw what
14 these people were doing through the special projects here.

15 But I would also submit to you it did impact
16 proceedings here in Ohio as Ohioans made decisions about
17 what to do with smoking and health throughout the years.
18 And part of this scheme not only involved deceiving the
19 federal government, but also state and local legislatures,
20 and I think that came through clear and is in the documents.

21 They not only have this organization set up here as we
22 talk about it, whether it was feasible or not, but they also
23 have an international organization, ICOSI.
24 They talked -- they had a person come in and said it
25 wasn't feasible because the rest of the world was not

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1 involved, quote, in the scheme. But think about these three
2 things: One, these companies, as they've admitted
3 themselves, were light-years ahead of the other companies in
4 the rest of the world; number two, they're the biggest
5 companies in the world. Philip Morris, quote, leads the
6 way. Three, the person that they had come in to testify to
7 that knew nothing about the R&D, research and development,
8 expenditures for their companies that he said supposedly
9 could overcome the barriers of entry into this country.

10 And I guess I went over three, and the fourth one is
11 that he couldn't even tell you what brands were in these
12 countries that he said these companies would become
13 involved.

14 And finally, he had to admit there was this
15 international organization, ICOSI, in which these same
16 companies, companies that were in seven or more countries,
17 had gotten together to form another organization.

18 I don't know if that organization -- and we're not
19 making that claim -- is the same as this TIRC, CTR and TI,
20 but it is an organization in which the companies in the rest
21 of the world have gotten together.

22 So after you go through the mail fraud and each
23 defendant that you've answered yes here, you have to answer
24 yes down here to see whether that defendants committed mail
25 fraud, beneficiaries reasonably relied; predicate acts; it

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1 has to go through a pattern. It cannot only be -- it can be
2 one mailing and then one obstruction of justice charge or
3 one tampering and one mailing, but they have to interrelate.

4 And there is kind of a catch here, that in Ohio, and it
5 was in the Judge's instructions, that it can't just be the
6 mail and wire fraud, which is the more common, the scheme
7 things. There has to be a predicate act found for these
8 companies aside from the mail and wire fraud.

9 So if you proceed to part two and you find wire fraud,
10 yes, the press releases issued by these companies and
11 through the CTR and through other entities, that they
12 controlled and were agents, that they were operated as a
13 fraud on the funds, and you answered yes here to all of
14 these, and you go on and answer yes here, and then you get
15 to tampering, which is a separate predicate act and has
16 separate instructions, and you've got to look at each
17 instruction because they are a little different.

18 Tampering and obstruction of justice are closely
19 related, but they're sufficiently different and have
20 different elements.

21 One, the tampering requires a proceeding, and the
22 obstruction of justice has a concealment aspect to it and
23 assisting another in a crime.

24 And I would submit all of these companies joined
25 together to assist each other to shift these costs, and

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1 that's what it really was. They shifted these costs onto
2 the health funds when they should have taken the
3 responsibility or made the announcements early in '54, and
4 as a result of their actions, beneficiaries started smoking
5 earlier, and the health funds were damaged and suffered

6 damage throughout the years.

7 And as you get through the tampering, which has two
8 questions to each, you have obstruction of justice, the same
9 two questions there. As to each company, you have to make a
10 finding.

11 And now we get to part five, which is the corrupt
12 activity act. Now, this is essentially what the charge is.
13 What we allege is that this group of companies, because it
14 was plausible and they had a motivation, gathered together
15 and formed a group or joined together and worked through an
16 enterprise, and that's what this TIRC, CTR, H&K and TI are,
17 and that's what the instruction will say to you.

18 And if you find they did join -- and we know they
19 did -- if you take a look at the evidence, you see they all
20 joined in the early '50s, that they joined together and that
21 they operated in such a manner as to exert control over the
22 CTR and the TI.

23 And you saw those documents, how they did exert that
24 control that they set on the board of directors, that they
25 controlled the lawyers, that controlled those groups; and

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1 TI, according to at least several documents, was just a
2 spokesman for those lawyers.

3 If you find that control, then you find that they --
4 then you can find and put yes as to each of these companies,
5 that they violated the Corrupt Activity Act.

6 And then you answer those two questions there, and you
7 go to a third question now. And this is the question
8 whether that activity -- and what Mr. Weber and Mr. Rowe
9 were talking about -- caused the damage to the funds. And
10 you get down here and you have the specific funds here that
11 are referenced here, and they're the representative funds in
12 this case. They're the funds that brought the action on
13 behalf of the class.

14 And in this, and at this time you're not being asked
15 the amount of any damage. All you're being asked to do is
16 to decide whether they were substantial cause in the damage
17 that these funds suffer, and we would submit to you that we
18 presented enough evidence and sufficient evidence that over
19 the years that they undertook these activities that they did
20 operate as a fraud and did cause damage to these funds.

21 And you go on, and decide that same thing as to a
22 conspiracy claim for the corrupt practice act, and then you
23 get down to the final charge here, which is the civil
24 conspiracy charge.

25 And you have to make that finding as to whether -- it's
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1 just a little different, it's not the same joining. It can
2 be an agreement, a tacit agreement. For the last charge you
3 don't need the enterprise. You don't need the active
4 participation in the TIRC or Hill & Knowlton, or anything
5 else, you just have to find that there was a tacit agreement
6 that operated and that they worked together and operated as
7 a fraud on the funds.

8 Thank you very much, Ladies and Gentlemen, for your
9 time in the last several weeks. We appreciate your
10 attentiveness and stick-to-it-tiveness, and sometimes coming
11 in when you're sick and making it here when it was snowing,
12 and this is an important case for both sides, and we
13 appreciate the seriousness of the case, and what you bring
14 to it, and that you'll consider the evidence as it came in
15 in this case and consider it in a fair light.

16 Thank you very much.

17 THE COURT: Now it is proper to add the caution
18 that nothing said in these instructions and nothing in the
19 verdict forms prepared for your convenience are meant to
20 suggest or convey in any way or any manner any intimation of
21 what the verdict I think you should find.

22 What the verdict shall be is your sole and exclusive
23 duty and responsibility.

24 Now, if it becomes necessary during your deliberations
25 to communicate with the Court, you may send a note by the

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1 deputy clerk, signed by your foreperson or by one or more of
2 your members.

3 No member of the jury should ever attempt to
4 communicate with the Court by any means other than through a
5 signed writing, and the Court will never communicate with
6 any member of the jury on any subject touching the merits of
7 the case otherwise than in writing or orally here in open
8 court.

9 I would note from the oath that the bailiff are
10 forbidden to communicate with you, the bailiff or the deputy
11 clerk, in any way or manner on any subject touching upon the
12 merits of the case.

13 Bear in mind also that you are never to reveal to any
14 person, not even to the Court, how the jury stands
15 numerically or otherwise on any question before you until
16 after you've reached a unanimous verdict.

17 Let me also give you an additional caution. You are
18 going to be taking and beginning deliberations. You're only
19 to deliberate and discuss this case when all 11 of you are
20 present in the jury room and able to hear the comments,
21 observations, and thoughts of the other jurors. So if at
22 any time not all 11 of you are present in the jury room,
23 cease your deliberations until all of you are present and
24 able to hear the thoughts of the fellow jurors.

25 Your verdict must represent the considered judgment of
4773

1 each juror. In order to return a verdict it's necessary
2 that each juror agree thereto. In other words, your verdict
3 must be unanimous.

4 This is also true with regard to the responses to the
5 interrogatories. As to each response, your verdict must be
6 unanimous.

7 It is your duty as jurors to consult with one another
8 and to deliberate with a view to reaching an agreement if
9 you can do so without violence to your individual judgment.

10 Each of you must decide the case for yourself, but only
11 after an impartial consideration of all of the evidence in
12 the case with your fellow jurors.

13 In the course of your deliberations, do not hesitate to
14 re-examine your own views and change your opinion if
15 convinced that it is erroneous, but do not surrender your
16 honest convictions as to the weight or effect of the
17 evidence solely because of the opinion of your fellow
18 jurors, or for the mere purpose of returning a verdict.

19 Remember at all times, you are not partisans. You are
20 judges, judges of the fact. Your sole interest is to seek
21 the truth from the evidence in the case.

22 Now, upon retiring to the jury room you will first
23 select one of your number to act as your foreperson, who
24 will preside over your deliberations and will be your
25 spokesperson here in court.

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1 When you have reached the unanimous agreement as to

2 your verdict you will have your foreperson fill in, date,
3 and sign the form which sets forth the verdict upon which
4 you have unanimously agreed. Each of you, of course, must
5 sign the verdict.
6 It's proper to add the caution that nothing said in
7 these instructions is meant to suggest or convey in any way
8 or any manner any intimation as to what the verdict is I
9 think you should find.
10 What the verdict shall be is the sole and exclusive
11 duty and responsibility of the jury.
12 You will take with you a copy of the instructions for
13 your assistance. It's my hope that these answer any
14 questions you have as the law I instruct you on.
15 You will leave all of the interrogatories on your
16 seat. So leave your copies of the interrogatories on your
17 seat, and a separate copy will be sent in to you.
18 I caution you again, that with regard to any message
19 you might send that you should never state or specify any
20 numerical division at that time.
21 I would ask counsel to just finally approach for a
22 second.
23 (Discussion at side-bar on the record:)
24 THE COURT: Does counsel for the plaintiff think
25 there is anything else that needs to be dealt with?
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1 MR. COUGHLIN: No, Your Honor.
2 THE COURT: Anything from the defendants?
3 MR. WEBER: No, Your Honor.
4 THE COURT: Thank you.
5 (Proceedings in courtroom in the presence of the Jury.)
6 THE COURT: Now, the courtroom deputy will now
7 escort the jury to the jury room, taking to them the Court's
8 charge, which you already have.
9 The interrogatories will come to you in a few minutes.
10 The verdict forms will come to you in a few minutes. The
11 exhibits will be brought to you in a number of minutes, as
12 well, so those will all be sent to you.
13 We're going to stand in recess. Let me give you one
14 caution. At some point you may during the course of your
15 deliberations wish to take a recess. If you have any such
16 feelings, communicate that to the deputy clerk.
17 Also, I again caution you as to any time when you're
18 not deliberating, you're absolutely not to say anything to
19 anyone about the status of the case or the nature of your
20 deliberations.
21 Now, after the case is over you can talk about it to
22 your heart's delight, but especially now, don't say anything
23 to anybody until a verdict has been reached.
24 So finally, take the note pads with you, and again,
25 leave the interrogatories on your seat.
4776
1 We'll stand in recess at this time.
2 (The jury retired to deliberate.)
3 (Proceedings in courtroom out of the presence of the jury:)
4 THE COURT: I'd ask counsel to come forward and
5 examine the verdict form and the interrogatories, and bring
6 to the Court's attention any questions you have concerning
7 it.
8 I just would finally caution counsel that before the
9 exhibits go back, both sides need to insure that only
10 exhibits that are properly sent back to the jury are
11 included in these that go to the jury.
12 So if there is any questions, bring it to my attention,

13 but if I do not hear anything on that issue, I'll understand
14 that you've examined the exhibits and only the proper ones
15 have been forwarded to the jury.
16 MR. BERNICK: When is your intent to send them
17 back?
18 THE COURT: I usually will be guided by their
19 sentiment. If they desire to stay a little bit later we'll
20 stay. If they desire to recess for today, I'll likely do
21 that after a certain period of time.
22 MR. WEBER: Judge, could I ask you, different
23 Courts do it differently, how late do they -- is that purely
24 up to them or --
25 THE COURT: Not purely, but -- so my tendency
4777
1 would be that if they're here at sometime after 6:00 that it
2 would be likely that I might well send them home.
3 MR. WEBER: And they would come back at --
4 THE COURT: 8:00. So we'll stand in adjournment.
5 - - - - -
6 4:15 P.M.
7 THE COURT: We would note we have a request from
8 the jury for a break. I assume no one cares.
9 What I'm going to do, I'll send them, tell them 15
10 minutes, and then I'll ask the deputy clerk to stay with
11 them, and then unless there is some request, I'll just
12 return them directly to the jury room.
13 MR. COUGHLIN: No. We could put the boxes in the
14 jury room if they're going out so Vickie doesn't have to
15 carry them back.
16 THE COURT: Are the exhibits ready to go though?
17 MR. COUGHLIN: Yes.
18 THE COURT: Why don't you tell them we'll do that
19 while they're gone.
20 THE CLERK: They're going along when you first
21 look in the left-hand side, I emptied the whole row there.
22 THE COURT: Do you want to keep this, Vickie?
23 THE CLERK: Yes. Could you take the flip chart
24 in, also?
25 THE COURT: Wait until they go out.
4778
1 THE CLERK: I'll let you know.
2 - - - - -
3 4:50 P.M.
4 THE COURT: We have another communication from the
5 jury. The communication reads, is the jury permitted to
6 take the jury instructions home with us to review? Can we
7 recess at 5:00 p.m.?
8 So I think the answer would likely be no and yes.
9 MR. COUGHLIN: That's fine, Your Honor.
10 MR. WEBER: No objection.
11 THE COURT: Although the only question I would say
12 to you is, do you know if this -- they probably haven't
13 said -- I'm going to respond to the jury as that if the jury
14 wishes to respond or to recess until tomorrow, because I'm
15 just wondering whether this is their actual sentiment that
16 they want to recess now, or he's just asking generally
17 whether they have a right to ask to recess.
18 I'm going to respond to the jury, if the jury wants to
19 recess at 5:00, advise the deputy clerk. No, you cannot
20 take the instructions home.
21 And can you just get a response from them?
22 THE CLERK: Sure.
23 THE COURT: Here is a proposal in terms of the

24 interrogatories, if you want to have somebody come up.
25 MR. WEBER: I have my lawyer here, Judge. 4779

1 (Discussion off the record.)
2 THE COURT: Can we just go on the record.
3 I've shared with the parties the proposed revised
4 corrupt activity interrogatories, and I've changed -- or
5 I've added an additional interrogatory number two dealing
6 with the conspiracy allegation in the corrupt activity
7 claim.
8 And the parties have reviewed this, and without
9 objection I'm going to send it back to the jury.
10 I'll print off just one more copy.
11 MR. JONES: We would just note we had an objection
12 to the instruction upon which it was based, but we don't
13 have an objection to the interrogatory in light of the
14 instruction.
15 THE COURT: Okay. They're indicating they want to
16 recess, and they've indicated that juror number 4 is
17 foreman.
18 So I'll tell them that they can leave, that they can
19 return at 8:00 a.m. tomorrow morning, and that -- well, is
20 everyone here? I typically deal with this by way of written
21 communications, but since everyone is here I may bring them
22 into the courtroom and just remind them again of their
23 oaths.
24 MR. COUGHLIN: Okay.
25 THE COURT: Why don't you bring them in. 4780

1 (Proceedings in courtroom in the presence of the Jury.)
2 THE COURT: Have a seat. We're going to recess
3 for the night.
4 I did want to caution you again just that you are not
5 allowed to talk about the case with anyone. You're probably
6 going to get some questions at home or by friends, and say
7 you absolutely can't talk about the case whatever, that it
8 would be very improper for you to do so.
9 I recommend typically to jurors that they try to give
10 themselves overnight seasons like this some distance from
11 the case.
12 I think it is sometimes better to put the case behind
13 and wait until you return tomorrow morning to able to hear
14 the comments of the other jurors, and their observations on
15 the evidence before you form, reach or express any
16 conclusions.
17 Attendance is also very much mandatory. You've all
18 invested an awful lot of time in this case, and so it's more
19 important than ever that you make sure that you're here by
20 8:00 tomorrow.
21 So with those thoughts to you and those directions,
22 we're going to stand in recess.
23 The deputy clerk will help you get out of the
24 building. Again, don't let anybody talk about the case in
25 your presence or near you. Okay? So be very mindful of 4781

1 those instructions.
2 We'll stand in recess.
3 (The jury exited the courtroom.)
4 THE COURT: The parties were able to review the
5 verdict forms, I understand, and there was no question about
6 that?
7 MR. COUGHLIN: No, Your Honor.
8 MR. WEBER: The verdict form, Jeff?

9 MR. JONES: Right.
10 THE COURT: It was only -- okay. I'll prepare
11 that interrogatory or print a fresh copy, and then we'll
12 send it back to them tomorrow.
13 MR. WEBER: Judge, what does -- just a quick
14 question.
15 THE COURT: Off the record.
16 (Discussion off the record.)
17 (Proceedings adjourned.)
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2 C E R T I F I C A T E
3
4 We certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.
6
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8 Heidi Blueskye Geizer, RMR, CRR Date
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10 Richard G. DelMonico Date
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